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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 629

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, ET AL., PETITIONERS

vs.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JANUARY 31, 1939
CERTIORARI GRANTED MARCH 13, 1939

SUPREME COURT OF THE UNITED STATES

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A In the District Court of the United States for the District of Columbia

No. 59008 in Equity

ROBERT C. BALDWIN, RECEIVER, COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C. A CORPORATION, PLAINTIFF

vs.

INLAND WATERWAYS CORPORATION, A CORPORATION; UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, A CORPORATION; GEORGE H. DERN, SECRETARY OF WAR; ARTHUR L. FLINT, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, THE PANAMA CANAL; HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, SUCCESSOR IN INTEREST TO ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES; CREED FULTON COX, CHIEF OF BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT; C. F. BROWN, DISBURSING AGENT, PHILIPPINE REVENUE, BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT; HENRY MORGENTHAU, JR., DEFENDANTS

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Amended bill of complaint*

Filed June 4, 1936

In the Supreme Court of the District of Columbia

Holding an Equity Court

Equity No. 59,008

ROBERT C. BALDWIN, RECEIVER, COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C. A CORPORATION, PLAINTIFF

vs.

INLAND WATERWAYS CORPORATION, A CORPORATION; UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, A CORPORATION; GEORGE H. DERN, SECRETARY OF WAR; ARTHUR L. FLINT, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, THE PANAMA CANAL; HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, SUCCESSOR IN INTEREST TO ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES; CREED FULTON COX, CHIEF OF BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT; C. F. BROWN, DISBURSING AGENT, PHILIPPINE REVENUE, BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT; HENRY MORGENTHAU, JR., WASHINGTON, D. C., DEFENDANTS

The Amended Bill of Complaint of the plaintiff filed, with leave of Court first had and obtained, represents to this Honorable Court as follows:

1. The plaintiff is a citizen of the United States and a resident of the District of Columbia, and brings this suit as the duly appointed and qualified receiver of the Commercial National Bank of Washington, D. C., a national banking association organized under the laws of the United States, formerly having its place of business and conducting its operations in the District of Columbia, and as more fully hereinafter shown.

2. The defendant, Inland Waterways Corporation, is a corporation organized and existing under the Act of Congress of
2 June 3, 1924 (43 Stat. p. 360), and acts amendatory thereof, and located and having its place of business in the District of Columbia, and is sued as hereinafter shown.

3. The defendant, United States Shipping Board Merchant Fleet Corporation, is a corporation organized and existing under the laws of the District of Columbia and located and doing business therein, and is sued as hereinafter shown.

4. The defendant, George H. Dern, is a citizen of the United States and resident of the District of Columbia. Said defendant is Secretary of War of the United States and is sued as such in his official capacity incident to the performance of his duties with reference to the Canal Zone Territory on the Isthmus of Panama, and also incident to the performance of his duties on behalf of the Government of the Philippine Islands, all as more fully hereinafter set forth.

5. The defendant, Arthur L. Flint, is a citizen of the United States and resident of the District of Columbia, and is sued in his official capacity as General Purchasing Officer and Chief of Washington Office, the Panama Canal, and as more fully hereinafter shown.

6. The defendant, Creed Fulton Cox, is a citizen of the United States and resident of the District of Columbia, and is sued as Chief of the Bureau of Insular Affairs, War Department, and as more fully hereinafter shown.

7. The defendant, C. F. Brown, is a citizen of the United States and a resident of the District of Columbia, and is sued as Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, and as more fully hereinafter shown.

8. The defendant, Homer S. Cummings, is a citizen of the United States and resident of the District of Columbia, and is Attorney General of the United States, and is sued in his official capacity as
Attorney General as successor in interest to the Alien
3 Property Custodian of the United States, as more fully hereinafter shown.

8. (a) The defendant, Henry Morgenthau, Jr., is a citizen of the United States, temporarily residing in the District of Columbia, and is sued as the custodian of certain funds claimed by plaintiff as assets of the Commercial National Bank of Washington, representing the proceeds of certain bonds and certain other moneys paid under mistake of law to George H. Dern and Creed Fulton Cox and transmitted by them to The Chase National Bank of the City of New York and thereafter transmitted by said Chase National Bank to said defendant, Henry Morgenthau, Jr.

8. (b) The defendants, and each of them, are sued in both their individual and official capacities.

9. The Commercial National Bank of Washington, D. C., on, to wit, February 27, 1933, closed its doors and suspended its operations, and was found and determined to be insolvent by the Comptroller of the Currency of the United States, and thereafter, on February 28, 1933, plaintiff, Robert C. Baldwin, was appointed receiver and qualified as such and since such appointment and qualification has been, and now is, the receiver of said bank and is now acting in such capacity.

10. The plaintiff avers that on, to wit, the 18th day of July 1930, defendant Inland Waterways Corporation opened a savings deposit account in said Commercial National Bank and from time to time thereafter defendant deposited various sums of money therein, and at suspension and closing of said bank the credit balance on deposit in said savings account, together with accrued interest compounded monthly to the date of said suspension, amounted to the sum of, to wit, $271,113.05. Plaintiff further avers that on, to wit, the 5th day of March 1931, the Inland Waterways Corporation opened a
4 checking account in said Commercial National Bank, and from time to time thereafter deposited various sums of money therein, and at suspension and closing of said bank the credit balance on deposit in said checking account, together with accrued interest compounded monthly to date of said suspension, amounted to the sum of, to wit, $211,543.52.

That on divers dates after the opening of the aforesaid deposit accounts, and during the existence of said accounts, said Commercial National Bank unlawfully and illegally pledged with and to said Inland Waterways Corporation, as security for the repayment of the indebtedness of the bank created by the deposit of said funds in said accounts, certain of the assets of said bank consisting of various and sundry bonds of the par value of, to wit, the sum of $500,000, a more detailed description and list of which is hereinafter set forth in Exhibit A hereto attached and made a part hereof by this reference.

Plaintiff avers that there was no authority or capacity in said Commercial National Bank to pledge said assets as aforesaid as security for the debts created incident to said deposits of said Inland Waterways Corporation, and that said bonds thereupon became a trust, and were so held as such by defendant Inland Waterways Corporation, for the benefit of said bank, its depositors, creditors, and stockholders.

Plaintiff further avers that after the suspension of said bank and on, to wit, April 20, 1933, plaintiff acting under mistake of law, illegally redeemed from said Inland Waterways Corporation a portion of the aforesaid assets so pledged, consisting of, to wit, United States 4¼ Liberty Loan Bonds of October 15, 1933–38, of a par value of, to wit, the sum of $245,000, by the erroneous and unlawful payment to said Inland Waterways Corporation of, to wit, the sum of $245,000.00.

Plaintiff therefore avers that said illegal payment constituted a
5 trust fund for the benefit of the depositors and creditors and stockholders of said bank and as such is recoverable by plaintiff from said Inland Waterways Corporation, together with interest on said sum of $245,000 at the legal rate from April 20, 1933 (the date of such illegal payment) to the date of recovery of said sum by plaintiff, subject to adjustment and deductions for the dividends hereinafter indicated.

That on, to wit, April 20, 1933, said Inland Waterways Corporation sold the residue of said collateral theretofore illegally pledged as aforesaid, for the sum of, to wit, $261,215.63. Plaintiff avers that the action of said Inland Waterways Corporation in selling said remaining collateral as aforesaid, for said sum of, to wit, $261,215.63, was illegal, and without authority of law, and that the proceeds of said sale became charged with, and constituted, a trust for the benefit of the depositors and creditors and stockholders of said bank and as such is recoverable by plaintiff from said Inland Waterways Corporation, together with interest on said sum of $261,215.63 at the legal rate, from, to wit, April 20, 1933 (the date of said illegal sale) to the date of recovery of said sum by plaintiff, subject to adjustment and deductions for the dividends hereinafter next indicated.

Plaintiff further avers that on, to wit, September 26, 1933, a first dividend of 20% of the amount of outstanding claims against said Commercial National Bank, and on, to wit, November 13, 1933, a second dividend of 30% upon the outstanding claims against said Commercial National Bank, were paid to the depositors and creditors of said bank who had duly established their claims against said bank as general creditors, and accordingly plaintiff concedes that the trust fund hereinbefore set forth as recoverable by plaintiff from said
Inland Waterways Corporation is properly subject to djust-
6 ment and deduction in the sums representing the aforesaid dividends of 20% and 30% respectively, paid to the general creditors of said Commercial National Bank, plus a further deduction and adjustment in the sum of, to wit, $21,804.16 refunded and returned by said Inland Waterways Corporation to plaintiff on, to wit, April 25, 1933.

11. The plaintiff avers that on, to wit, the 18th day of August, 1917, the United States Shipping Board Emergency Fleet Corporation, the name and title under which the defendant United States Shipping Board Merchant Fleet Corporation was formerly known, opened a deposit account in said Commercial National Bank and from time to time thereafter the defendant deposited various sums of money therein, and at suspension said account was carried under the caption "United States Shipping Board Merchant Fleet Corporation, Agent Deposit Account", and the credit balance on deposit in said account at the suspension and closing of said bank amounted to the sum of, to wit, $264,302.16. Plaintiff further avers that, on to wit, the 14th day of January, 1926, the defendant, under its former name of United States Shipping Board Emergency Fleet Corporation, opened another deposit account in said bank, and from time to time thereafter deposited various sums of money therein, and at the suspension and closing of said bank the credit balance on deposit in said account, which was carried under the caption "United States Shipping Board Merchant Fleet Corporation, Agent Good Faith Deposit Account", amounted to the sum of, to wit, $144,995.12. A copy of the deposit contract is attached hereto, marked Exhibit B-1, and made a part hereof by this reference.

That thereafter the name of defendant was altered from "United States Shipping Board Emergency Fleet Corporation" to "United

States Shipping Board Merchant Fleet Corporation." That during the existence of said accounts said Commercial National Bank unlawfully and illegally pledged with and to said United States Shipping Board Merchant Fleet Corporation, or its predecessor in name, as security for the repayment of the indebtedness of the bank created by the deposit of said funds in said accounts, certain of the assets of said bank consisting of various and sundry bonds of the par value of the sum of, to wit, $400,000, a more detailed description and list of which is hereafter set forth, marked Exhibit B-2, attached hereto and made a part hereof by this reference.

7

Plaintiff avers that there was no authority or capacity in said Commercial National Bank to pledge said assets, as aforesaid as security for the debts created incident to said deposits of said United States Shipping Board Merchant Fleet Corporation, or its predecessor in name, and that said bonds thereupon became a trust, and were so held as such by defendant United States Shipping Board Merchant Fleet Corporation, or its predecessor in name, for the benefit of said bank, its depositors, creditors and stockholders.

Plaintiff further avers that after the suspension of said bank and on, to wit, April 13, 1933, and April 18, 1933, respectively, plaintiff acting under a mistake of law, illegally redeemed from said United States Shipping Board Merchant Fleet Corporation a portion of the aforesaid assets so pledged, consisting of, to wit, $75,000 par value United States Treasury 3⅜% Bonds due March 15, 1943, which were redeemed by the receiver as aforesaid on, to wit, April 13, 1933, and to wit, $200,000 par value Fourth Liberty Loan 4¼% Bonds due October 15, 1933-38, which were redeemed as aforesaid, on, to wit, April 18, 1933, by the erroneous and unlawful payment to said United States Shipping Board Merchant Fleet Corporation of the total sum of, to wit $281,695.31. Plaintiff therefore avers that said illegal total payments in the sum of, to wit, $281,695.31 constituted trust funds held for the benefit of the depositors and creditors and stockholders of said bank and as such are recoverable by plaintiff from said United States Shipping Board Merchant Fleet Corporation, together with interest on said sums so illegally paid from the date of such payment to the date of recovery of said sums by plaintiff, subject to adjustment and deductions for the dividends hereinafter indicated.

8

Plaintiff avers that on, to wit, April 17, 1933, said United States Shipping Board Merchant Fleet Corporation sold the residue of said collateral theretofore illegally pledged as aforesaid, for the sum of, to wit, $125,929.69. Plaintiff further avers that said defendant, United States Shipping Board Merchant Fleet Corporation, illegally collected and retained the proceeds representing the income in the form of interest coupons affixed to said pledged securities in the sum of, to wit, $5,515.49. Plaintiff avers that the action of said United States Shipping Board Merchant Fleet Corporation in selling said remaining collateral as aforesaid for the sum of $125,929.69, was illegal, without authority of law, and that the proceeds of said sale became charged with, and constituted, a trust for the benefit of the depositors and creditors and stockholders of said bank and as such is recoverable by plaintiff from said United States Shipping Board Merchant Fleet Corporation, together with interest from, to

wit, April 17, 1933 (the date of said illegal sale), to the date of the recovery of said sum, with interest, by plaintiff, subject to adjustment and deductions for the dividends hereinafter indicated.

Plaintiff avers that the action of said United States Shipping Board Merchant Fleet Corporation in collecting and retaining the income in the form of interest coupons on said pledged securities was illegal and without authority of law, and that such
9 income so collected became charged with, and constituted, a trust for the benefit of the depositors and creditors and stockholders of said bank, and as such is recoverable by plaintiff from said United States Shipping Board Merchant Fleet Corporation, together with interest on said sum of, to wit, $5,515.49, from the date of such collections to the date of recovery of said sum by plaintiff, subject to adjustment and deductions for the dividends hereinafter indicated."

Plaintiff further avers that on, to wit, September 26, 1933, a first dividend of 20% of the amount of outstanding claims against said Commercial National Bank, and on, to wit, November 13, 1933, a second dividend of 30% upon the outstanding claims against said Commercial National Bank, were paid to depositors and creditors of said bank who had duly established their claims against said bank as general creditors and accordingly plaintiff concedes that the trust funds hereinbefore set forth as recoverable by plaintiff from said United States Shipping Board Merchant Fleet Corporation are properly subject to adjustment and deductions in the sums representing the aforesaid dividends of 20% and 30%, respectively, paid to the general creditors of the said Commercial National Bank, plus a further deduction and adjustment in the sum of, to wit, $4,270.17, refunded and returned by said United States Shipping Board Merchant Fleet Corporation to plaintiff on, to wit, April 27, 1933.

12. The plaintiff avers that on, to wit, the 1st day of May, 1911, the Secretary of War opened a deposit account in said Commercial National Bank, which account was carried under the caption of "Government of Canal Zone", in accordance with a certain contract entered into by the then Secretary of War and the Commercial National Bank, a copy of which is hereto annexed, marked Exhibit C–1 and made a part hereof by this reference, and from time to time thereafter said Secretary of War deposited various sums of
10 money therein, and at suspension and closing of said bank the credit balance on deposit in said savings account amounted to the sum of, to wit, $711,622.92.

Plaintiff further avers that on divers dates after the opening of the aforesaid deposit account, and during the existence of said account, said Commercial National Bank unlawfully and illegally pledged with and to the then Secretary of War, by the delivery to his subordinate officer, the then General Purchasing Officer and Chief of the Washington Office, The Panama Canal, as security for the repayment of the indebtedness of the bank created by the deposit of said funds in said account, certain of the assets of said bank, consisting of various and sundry bonds of the aggregate par value of, to wit, $791,000, a more detailed description and list of which is hereinafter set forth, marked Exhibit C–2, attached hereto and made a part hereof by this reference.

Plaintiff avers that there was no authority or capacity in said Commercial National Bank to pledge said assets as aforesaid as security for the debt created incident to said deposits of said Secretary of War, and that said bonds thereupon became a trust and were so held as such by the Secretary of War and his subordinate officer, the General Purchasing Officer and Chief of the Washington Office, the Panama Canal, for the benefit of said bank, its depositors, creditors, and stockholders.

Plaintiff further avers that after the suspension of said Bank and on, to wit, June 16, 1933, the Secretary of War directed Arthur L. Flint, General Purchasing Officer and Chief of Washington Office, The Panama Canal, to take over said bonds, as is evidenced by a copy of a certain letter dated June 16, 1933, which is attached hereto, marked Exhibit C–3 and made a part hereof by this reference. Plaintiff further avers that, acting under mistake of law, he acceded to the taking over of said bonds. Plaintiff avers that said bonds became a trust, and were held as such by the defendant, the Secretary of War, and the General Purchasing Officer and Chief of the Washington Office, The Panama Canal, for the benefit of said bank, its depositors, creditors and stockholders, and plaintiff claims the return of said bonds, or in the alternative, if sold, the proceeds derived from such sale, together with interest upon the proceeds at the legal rate from the date of the sale of said bonds to the date of recovery of said sum by plaintiff, and together with all income accrued upon said bonds and collected and retained by said defendants from and after, to wit, February 28, 1933, with interest at the legal rate on said income so collected to the date of recovery by plaintiff, subject to adjustment and deductions for the dividends hereinafter next indicated.

Plaintiff further avers that on, to wit, September 26, 1933, a first dividend of 20% of the amount of outstanding claims against said Commercial National Bank, and on, to wit, November 13, 1933, a second dividend of 30% upon the outstanding claims against said Commercial National Bank, were paid to the depositors and creditors of said bank who had duly established their claims against said bank as general creditors and accordingly plaintiff concedes that the trust funds hereinbefore set forth as recoverable by plaintiffs from said Secretary of War, and said General Purchasing Officer and Chief of the Washington Office, The Panama Canal, on behalf of the Government of the Canal Zone, are properly subject to adjustment and deduction in the sums representing the aforesaid dividends of 20% and 30%, respectively, paid to the general creditors of said Commercial National Bank.

13. The plaintiff avers that on, to wit, the 25th day of October, 1921, one Thomas W. Miller, Alien Property Custodian of the United States, opened a deposit account in said Commercial National Bank, and thereafter the title of said deposit account was changed to correspond to the change in personnel of the officers holding office as Alien Property Custodian of the United States, and from time to time thereafter various sums of money were deposited in said account, and at suspension and the closing of said bank the credit balance on deposit in said account, which then stood in the name of "Howard Sutherland, Alien Property Custodian, Special Account #2", amounted to the sum of, to wit, $162,298.93.

Plaintiff avers that on divers dates after the opening of the aforesaid deposit account and during the existence of said account, said Commercial National Bank unlawfully and illegally pledged with and to the Alien Property Custodian of the United States then holding office, as security for the repayment of the indebtedness of the bank created by the deposit of funds in said account, certain of the assets of said bank, consisting of various and sundry bonds of the par value of, to wit, $407,000, a more detailed description and list of which is hereinafter set forth in Exhibit D–1, hereto attached and made a part hereof by this reference.

Plaintiff avers that there was no authority or capacity in said Commercial National Bank to pledge said assets as aforesaid as security for the debts created incident to said deposits of the Alien Property Custodian, that said bonds thereupon became a trust, and were so held by the Alien Property Custodian for the benefit of said bank, its depositors, creditors and stockholders. Plaintiff avers that from time to time subsequent to the suspension of the bank, a portion of said collateral was sold by the Alien Property Custodian of the United States, as is shown in a schedule attached hereto and marked Exhibit D–2, and made a part hereof by this reference,
13 the total proceeds derived from said sales, including interest coupons collected, amounting to the sum of, to wit, $169,037.69, and said proceeds were applied by the Alien Property Custodian toward the payment of the credit balance on deposit in said Account of the Alien Property Custodian at the suspension of the Commercial National Bank, in the sum of, to wit, $162,298.93, and the unsold portion of said collateral was thereupon returned by said Alien Property Custodian to plaintiff as receiver of said bank, together with excess cash proceeds derived from the sale of said securities in the sum of, to wit, $6,738.76.

Plaintiff avers that the action of said Alien Property Custodian in selling said collateral as aforesaid was illegal, without authority of law, and that the proceeds of said sale became charged with, and constituted a trust for the benefit of the depositors and creditors and stockholders of said bank, and as such are recoverable by plaintiff from the defendant herein, Homer S. Cummings, Attorney General of the United States, as Successor in interest to the Alien Property Custodian of the United States, under and through an Executive Order of the President of the United States dated, to wit, May 1, 1934, numbered 6694, which order became effective on, to wit, July 1, 1934, together with interest on said sum of, to wit, $162,298.93, at the legal rate from the date of the sale of said collateral as aforesaid to the date of the recovery of said sums by plaintiff, subject to adjustment and deductions for the dividends hereinafter next indicated.

Plaintiff avers further that on, to wit, September 26, 1933, a first dividend of 20% of the amount of outstanding claims against said Commercial National Bank, and on, to wit, November 13, 1933, a second dividend of 30% upon the outstanding claims against
14 said Commercial National Bank, were paid to the depositors and creditors of said bank who had duly established their claims against said bank as general creditors, and accordingly plaintiff concedes that the trust fund hereinbefore set forth as recoverable by plaintiff from said Homer S. Cummings, Attorney General of the United States, as Successor in interest to the Alien Property Custodian of the United States, is properly subject to adjustment and

deduction in the sums representing the aforesaid dividends of 20% and 30%, respectively, paid to the general creditors of said Commercial National Bank.

14. The plaintiff avers that on, to wit, January 4, 1923, the then Secretary of War, purporting to act under authority of Section 625 of the Revised Administrative Code of 1917 of the Philippine Islands, designated the Commercial National Bank as a depositary bank in the United States for funds of the Government of the Philippine Islands, and approved, as Secretary of War, a bond given by said Commercial National Bank to the Government of the Philippine Islands providing for and covering the deposit of funds by the Government of the Philippine Islands in said Commercial National Bank, a copy of said bond being annexed hereto, marked Exhibit E–1, and made a part hereof by this reference. Plaintiff avers that under said contract deposits were made from time to time by the Government of the Philippine Islands in said bank and placed to the credit of said Government in an account captioned "Treasurer of Philippine Islands, Treasury Certificate Fund Account," and at the suspension and closing of said bank the credit balance on deposit in said account amounted to the sum of, to-wit, $1,003,602.74.

Plaintiff avers that on divers dates after the opening of the aforesaid deposit account and during the existence of said account said Commercial National Bank unlawfully and illegally pledged with and to the Secretary of War, through and by the then Chief of
15 the Bureau of Insular Affairs, as security for the repayment of the indebtedness of the bank created by the deposit of said funds in said accounts, certain of the assets of the bank, consisting of various and sundry bonds of the par value of, to-wit, $1,077,000, a more detailed description and list of which is hereinafter set forth in Exhibit E–2, hereto attached and made a part hereof by this reference.

Plaintiff avers that there was no authority or capacity in said Commercial National Bank to pledge said assets as aforesaid as security for the debts created incident to said deposits of said Government of the Philippine Islands, and that said bonds thereupon became a trust, and were so held as such by the Secretary of War and the Chief of Bureau of Insular Affairs, and their successors in office, for the benefit of said bank, its depositors, creditors and stockholders.

Plaintiff avers that on, to-wit, March 1 and 2, 1933, as evidenced by the affidavit of Edward A. Stockton, Jr., marked Exhibit E–3, attached hereto and made a part hereof by this reference, the collateral theretofore illegally pledged as aforesaid was sold for the sum of, to-wit, $997,448.33, a schedule of the bonds so sold and the prices obtained therefor being more fully set forth in Exhibit E–4, hereto attached and made a part hereof by this reference. Plaintiff avers that said sales as aforesaid were made by Patrick J. Hurley, then Secretary of War, acting through and by the then Chief of Bureau of Insular Affairs of the War Department, and plaintiff avers that the action of said Secretary of War and said Chief of Bureau of Insular Affairs in selling said collateral was illegal, and without authority of law, and that the proceeds of said sales became charged with, and constituted, a trust for the benefit of the depositors, cred-

itors, and stockholders of said bank, and as such are recoverable by plaintiff from the Secretary of War and the Chief of the
16 Bureau of Insular Affairs of the War Department, together with interest on said sum of, to wit, $997,448.33, at the legal rate from the date of said sales to the date of the recovery of said sums by plaintiff, subject to adjustment and deductions for the dividends hereinafter indicated. Plaintiff further avers that after the suspension of said bank and on, to wit, November 14, 1933, plaintiff, acting under mistake of law, illegally paid Creed F. Cox, Chief of the Bureau of Insular Affairs, acting for the Treasurer of the Philippine Islands, as is shown by Exhibit E-5, attached hereto and made a part hereof by this reference, the sum of, to wit, $6,154.41, and plaintiff avers that said illegal payment constituted a trust fund for the benefit of the depositors, creditors, and stockholders of said bank, and as such is recoverable by plaintiff from said Creed F. Cox, Chief of the Bureau of Insular Affairs, and the Secretary of War, together with the interest on said sum of, to wit, $6,154.41, from November 14, 1933, at the legal rate to the date of recovery of said sum by plaintiff, subject to adjustment and deductions for the dividends hereinafter indicated.

The plaintiff further avers that C. F. Brown is the Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, and as such Disbursing Agent has in his custody and under his control, moneys of the Philippine Islands, and is the Chief Disbursing Agent of Philippine funds in the District of Columbia, and said defendant is sued in his official capacity as Disbursing Agent of funds of the Government of the Philippine Islands, from which the Court may direct the payment of any moneys found due this plaintiff.

Plaintiff further avers that on, to wit, September 26, 1933, a first dividend of 20% of the amount of outstanding claims against said Commercial National Bank, and on, to wit, November 13, 1933,
17 a second dividend of 30% upon the outstanding claims against said Commercial National Bank, were paid to the depositors and creditors of said bank who had duly established their claims against said bank as general creditors, and accordingly plaintiff concedes that the trust funds hereinbefore set forth as recoverable by plaintiff from said Secretary of War, Chief of Bureau of Insular Affairs, and Disbursing Agent of Philippine Revenue, Bureau of Insular Affairs, or their successors in office, are properly subject to adjustment and deduction in the sums representing the aforesaid dividends of 20% and 30%, respectively, paid to the general creditors of said Commercial National Bank.

15. The plaintiff further avers that on to wit the 1st day of March 1933, the date the said bonds were sold, as heretofore described in paragraph 8 of the bill, the proceeds from the sale of said bonds were transmitted to and placed with the Chase National Bank of the City of New York, and thereafter said proceeds, together with other moneys paid under mistake of law to George H. Dern and Creed Fulton Cox and transmitted to the Chase National Bank of the City of New York, or part thereof, were transmitted to and placed with Henry Morgenthau, Jr.; and plaintiff further avers, by reason of the facts set forth in said bill of complaint and this amendment, that said proceeds derived from the sale of said securities were funds

of the plaintiff herein, as were the moneys erroneously paid said George H. Dern and Creed Fulton Cox and transmitted to the Chase National Bank of the City of New York and to said Henry Morgenthau, Jr., and by reason of the foregoing said Henry Morgenthau, Jr., received said proceeds and now holds them in trust for plaintiff.

16. Plaintiff further avers that the funds claimed by him in the bill of complaint, as hereinbefore set forth, are not moneys of the United States, are not part of the revenues of the United States, are
18 not subject to the control of the Secretary of the Treasury of the United States in his official capacity as Secretary of the Treasury with respect to moneys of the United States, and said moneys hereinbefore claimed from the defendant Inland Waterways Corporation are not moneys of said defendant Inland Waterways Corporation, and said moneys hereinbefore claimed from defendant United States Shipping Board Merchant Fleet Corporation are not moneys of said defendant United States Shipping Board Merchant Fleet Corporation, and said moneys hereinbefore claimed from George H. Dern and Arthur L. Flint, in connection with their official position relating to the Panama Canal, are not moneys of the Panama Canal, and said moneys hereinbefore claimed from the defendant Homer S. Cummings are not moneys of the United States, and said moneys claimed from George H. Dern, Creed Fulton Cox, C. F. Brown, and Henry Morgenthau, Jr., are not moneys of the Government of the Philippine Islands, and all of said moneys claimed by plaintiff in said bill of complaint are part of the trust assets of the insolvent Commercial National Bank of Washington, D. C., belonging to the general creditors of the bank, out of which trust assets all creditors are entitled to be paid ratably. The plaintiff further avers that said funds hereinbefore claimed by plaintiff in the bill of complaint have not been covered into the Treasury of the United States or the Treasury of any state, territory, or other government. Plaintiff further avers that the Commercial National Bank of Washington, D. C., was never designated by the Secretary of the Treasury, under regulations prescribed by said Secretary, as a depository of moneys of the Inland Waterways Corporation or of the United States Shipping Board Merchant Fleet Corporation or of the Government of the Canal Zone or of the Government of the Philippine Islands or of the Alien Property Custodian, nor did the Secretary of the Treasury exact from said Commercial National Bank of Washington, D. C., the pledges of securities which are the subject matter of this suit.

19 Wherefore, the premises considered, plaintiff prays:

1. That a writ of subpoena issue out of this Honorable Court to the defendants named herein, and each of them, requiring them to appear and to answer the exigencies of this Bill of Complaint.

2. That this Honorable Court adjudge and determine that the defendant Inland Waterways Corporation is indebted to, and should be required to account to plaintiff in the full sum of $245,000.00 as a trust fund, said amount representing trust funds and moneys of the insolvent Commercial National Bank preferentially paid to and received by said defendant as an illegal, erroneous, and unlawful payment to it of said sum, as a partial redemption by plaintiff, acting under a mistake of law, of collateral pledged, as hereinabove set forth, to secure deposits of said defendant Inland Waterways Corporation,

together with interest on said sum at the legal rate, from, to wit, April 20, 1933 (the date of said illegal preference), to date of payment subject to credits and dividend adjustments as set forth in said Bill of Complaint.

3. That this Honorable Court adjudge and determine that the defendant Inland Waterways Corporation is indebted to, and should be required to account to plaintiff in the full sum of $261,215.63 as a trust fund, said amount representing proceeds from the sale of collateral security of the insolvent Commercial National Bank, illegally pledged to and received by said defendant as an illegal, erroneous, and unlawful pledge of said assets, as hereinabove set forth, to secure deposits of said defendant Inland Waterways Corporation, together with interest on said sum at the legal rate, from, to wit, April 20, 1933 (the date of the sale of said securities), to date of payment to plaintiff, subject to credits and dividend adjustments as set forth in said Bill of Complaint.

4. That the funds specifically referred to in the Bill of
20 Complaint, and in Prayers Nos. 2 and 3 above, as being recoverable as trust funds from said defendant Inland Waterways Corporation, be credited with and made subject to adjustment and deduction for such sums as are represented by dividends of 20% and 30% of the amount of outstanding claims of said defendant against the Commercial National Bank, on which claims said defendant is entitled to be paid said dividends with depositors and other general creditors as of September 26, 1933, and November 13, 1933, respectively, together with a further deduction and adjustment for the sum of, to wit, $21,804.16, returned by said defendant to plaintiff as in said Bill of Complaint set forth.

5. That this Honorable Court adjudge and determine that the defendant United States Shipping Board Merchant Fleet Corporation is indebted to, and should be required to account to plaintiff, in the full sum of $281,695.31 as a trust fund, said amount representing trust funds and moneys of the insolvent Commercial National Bank preferentially paid to and received by said defendant as illegal, erroneous, and unlawful payment to it of said sum, as a partial redemption by plaintiff, acting under a mistake of law, of collateral pledged, as hereinabove set forth, to secure deposits of said defendant United States Shipping Board Merchant Fleet Corporation, together with interest on said sum, at the legal rate, from, to wit, April 13, 1933, and April 18, 1933 (the dates of said illegal preferences), to date of payment to plaintiff, subject to credits and dividend adjustments as set forth in said Bill of Complaint.

6. That this Honorable Court adjudge and determine that the defendant United States Shipping Board Merchant Fleet Corporation is indebted to, and should be required to account to plaintiff in the full sum of $5,515.49 as a trust fund, said amount representing collections by said defendant from collateral illegally pledged, as in said Bill of Complaint set forth, and illegally retained by
21 said defendant, together with interest on said sum, at the legal rate from the date of collection of said sum by said defendant to date of payment thereof to plaintiff, subject to credits and dividend adjustments, as set forth in said Bill of Complaint.

7. That this Honorable Court adjudge and determine that the defendant United States Shipping Board Merchant Fleet Corpora-

tion is indebted to, and should be required to account to plaintiff in the full sum of $125,929.69 as a trust fund, said amount representing proceeds from the sale of collateral security of the insolvent Commercial National Bank, illegally pledged to and received by said defendant as an illegal, erroneous and unlawful pledge of said assets, as hereinabove set forth, to secure deposits of said defendant United States Shipping Board Merchant Fleet Corporation, together with interest on said sum at the legal rate, from, to wit, May 8, 1933 and May 9, 1933 (the dates of the sales of said securities), to date of payment to plaintiff, subject to credits and divided adjustments as set forth in said Bill of Complaint.

8. That the funds specifically referred to in the Bill of Complaint, and in Prayers Nos. 5, 6, and 7 above, as being recoverable as trust funds from said defendant United States Shipping Board Merchant Fleet Corporation, be credited with and made subject to adjustment and deduction for such sums as are represented by dividends of 20% and 30% of the amount of outstanding claims of said defendant United States Shipping Board Merchant Fleet Corporation against the Commercial National Bank on which claims said defendant is entitled to be paid dividends with depositors and other general creditors as of September 26, 1933 and November 13, 1933, respectively, together with a further deduction and adjustment for the sum of, to wit, $4,270.17, returned by said defendant to plaintiff as in said Bill of Complaint set forth.

22 9. That the defendants George H. Dern and Arthur L. Flint, as Secretary of War and as General Purchasing Officer and Chief of Washington Office, respectively, or their successor or successors in office, and The Panama Canal, be adjudged and decreed by this Honorable Court to be indebted to, and be required to account to plaintiff for the bonds of the par value of $791,000.00 set out in Exhibit "C-2", attached to the Bill of Complaint, or the proceeds thereof if said bonds have been sold, as property impressed with a trust or as trust funds and moneys of the insolvent Commercial National Bank illegally pledged to and received by said defendants, and each of them, as set forth in said Bill, to secure deposits of said defendants, together with the income received by the defendants on said property from the said illegal pledge of said bonds to said defendants, or with interest at the legal rate on the proceeds of such bonds, if sold, from the date of sale thereof to the date of payment to plaintiff, subject to credits and dividend adjustments, as set forth in said Bill of Complaint.

10. That a sum representing the market value of said bonds on the date of the illegal pledging thereof, as set forth in the Bill of Complaint, or the proceeds from the sale of said bonds, referred to in Prayer No. 9 above, as being recoverable as trust property or trust funds from said defendants George H. Dern and Arthur L. Flint, as Secretary of War and as General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively, be credited with and made subject to adjustments and deduction for such sums as are represented by dividends of 20% and 30% of the amount of outstanding claims of said defendants against the Commercial Na-

tional Bank, on which claims said defendants are entitled to be paid dividends with depositors and other general creditors as of
23 September 26, 1933, and November 13, 1933, respectively.

11. That this Honorable Court adjudge and determine that the defendant, Homer S. Cummings, as the Attorney General of the United States, and as successor in interest to the Alien Property Custodian, or their successors in office, be required to account to plaintiff for the full sum of $162,298.93 as a trust fund, said amount representing proceeds from the sale of collateral security of the insolvent Commercial National Bank, illegally pledged to and received by said defendant or his predecessor or predecessors in office as an illegal, erroneous and unlawful pledge of said assets, as hereinabove set forth, to secure deposits of the Alien Property Custodian of the United States, together with interest on said sum of $162,298.93 at the legal rate, from the date of sale to the date of payment to plaintiff, subject to credits and dividend adjustments as set forth in said Bill of Complaint.

12. That George H. Dern, as Secretary of War, and Creed Fulton Cox, as Chief of the Bureau of Insular Affairs, War Department, and C. F. Brown, as Disbursing Agent of the Philippine Revenue, be adjudged and determined to be indebted to and should be required to account to plaintiff in the full sum of $997,448.33, said amount representing proceeds from the sale of collateral security of the insolvent Commercial National Bank, illegally pledged to and received by said defendants, or their predecessor or predecessors in office, as an illegal, erroneous and unlawful pledge of said assets, as hereinbefore set forth, to secure deposits of said defendants in said bank, together with interest on said sum at the legal rate, from, to wit, March 1st and March 2, 1933 (the dates of the sales of said securities), to date of payment to plaintiff, subject to credits and dividend adjustments as set forth in said Bill of Complaint.

24 13. That George H. Dern, as Secretary of War, and Creed Fulton Cox, as Chief of the Bureau of Insular Affairs, War Department, be adjuded and decreed to be indebted to, and should be required to account to plaintiff in the full sum of $6,154.41 as a trust fund, said amount representing trust funds and moneys of the insolvent Commercial National Bank preferentially paid to and received by said defendants, and each of them, or their predecessor or predecessors in office, as an illegal, erroneous, and unlawful payment to them of said sum, acting under a mistake of law, as in said Bill of Complaint set forth, together with interest on said sum at the legal rate from November 14, 1933 (the date of said illegal preference), to date of payment to plaintiff, subject to credits and dividend adjustments as set forth in said Bill of Complaint.

14. That the defendant C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, or his successor in office, be required to pay and satisfy any judgment or decree entered by this Court in respect to funds of the Government of the Philippine Islands from such moneys as said C. F. Brown, or his successor in office, may have under their control or in their possession.

14. (a) That the defendant, Henry Morgenthau, Jr., be required to account for and pay over to the plaintiff, as a trust fund for the benefit of the depositors and other creditors and stockholders of the insolvent Commercial National Bank of Washington, so much of the

proceeds from the sale of the bonds described in paragraph numbered 14 of the bill of complaint that have been transmitted to said Henry Morgenthau, Jr., from the Chase National Bank of the City of New York, together with such other moneys of plaintiff erroneously paid under mistake of law to George H. Dern and Creed Fulton Cox
25 and thereafter transmitted by them to the Chase National Bank of the City of New York, and by it transmitted to said Henry Morgenthau, Jr.

14. (b) That the Court grant such discovery and accounting as the nature of the case may require in order to grant the plaintiff the relief herein prayed.

15. And for such other and further relief as to this Honorable Court may seem just and proper.

ROBERT C. BALDWIN, *Receiver,*
Commercial National Bank.

SHERLEY, FAUST & WILSON,
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
GEORGE P. BARSE,
Attorney for Comptroller of the Currency,
of Counsel.

DISTRICT OF COLUMBIA, *ss:*

R. C. Baldwin, being first duly sworn, on oath, deposes and says that he has read the above amended Bill of Complaint by him subscribed, and knows the contents thereof; that the matters and things therein set forth are true according to his best knowledge and belief.

ROBERT C. BALDWIN, *Receiver,*
Commercial National Bank.

Subscribed and sworn to before me this 3d day of June, 1936.

[SEAL] JOSEPHINE L. HAYES, *Notary Public,*
District of Columbia.

26 *"Exhibit A"*

Description and list of various and sundry bonds pledged by the Commercial National Bank of Washington, D. C., to Inland Water Ways Corporation:

Par value	Description
$25,000.00	United States Treasury 3¾% Bonds of 3/15/46–56.
$245,000.00	United States Fourth 4¼% Liberty Loan Bonds of 10/15/33–38.

"Exhibit B–1"

Know all men by these presents:

That whereas the Commercial National Bank of Washington, a banking corporation duly organized and doing business under the laws of the United States and having its office and principal place of business at Washington, in the District of Columbia, has on deposit with it funds of the United States Shipping Board Merchant Fleet Corporation; and

Whereas the United States Shipping Board Merchant Fleet Corporation has requested security for such funds on deposit and such funds as may be hereafter from time to time deposited by it with the said The Commercial National Bank of Washington; and

Whereas the said United States Shipping Board Merchant Fleet Corporation has consented to the deposit of first deed of trust notes as security for the prompt payment of the said funds so on deposit and to be deposited:

Now, therefore, in consideration of the said funds now on deposit and to be hereafter deposited, or any part thereof, by
27 the United States Shipping Board Merchant Fleet Corporation, the said The Commercial National Bank of Washington, said depositary, has this day delivered to the United States Shipping Board Merchant Fleet Corporation the following described securities:

(1) One note for $100,000.00 payable three years after date with interest at the rate of 6% per annum, said interest being payable semi-annually, and secured by a first deed of trust on Lot Eighty-four (84) in Hurley Motor Company's Subdivision of Lots in Square Two hundred and nine (209), in the City of Washington, District of Columbia, as per plat recorded in Liber 65 folio 7 of the records of the office of the Surveyor of the District of Columbia.

(2) One note for $75,000.00 payable three years after date with interest at the rate of 6% per annum, said interest being payable semi-annually, and secured by a first deed of trust on Lot numbered One (1) in Block numbered Forty (40) in the Subdivision known as the "North Grounds of Columbia University", in the City of Washington, District of Columbia, as per plat recorded in the Liber Governor Shepherd folio 149 of the Records of the Office of the Surveyor of the District of Columbia;—said block numbered Forty (40) being now known for purposes of assessment and taxation as Square numbered Twenty-six hundred and Sixty-eight (2668);

(3) Promissory notes aggregating $1,683,377.08, payable five years after date, with interest, at the rate of 5% per annum, said interest payable semi-annually, and secured by a first deed of trust on Lot twenty-three (23) in the Combination of lots in Square Two Hundred and Twenty-three (223), made by the Commercial National Bank of Washington, as per plat recorded in Liber 58 of folio 69 of the Records of the office of the Surveyor of the District of Columbia; which said securities, together with any substitutes therefor which may be acceptable to the United States Shipping
28 Board Merchant Fleet Corporation, are hereby pledged as collateral security for the prompt payment on demand in writing of any and all funds so deposited or hereafter deposited to the credit of the United States Shipping Board Merchant Fleet Corporation, and the said The Commercial National Bank of Washington further agrees that the failure to so pay such funds or any part thereof on demand in writing, shall be evidence of default, and upon such demand and failure to pay, the said United States Shipping Board Merchant Fleet Corporation, its Treasurer, or such other person as may by it be designated, is authorized to sell the above-described securities at either public or private sale, after thirty days notice in writing of its intention to so sell, stating the time and place of such sale, with the right in said United States Shipping Board Merchant Fleet Corporation at any such public sale to purchase all or part of said securities free and discharged of any right of redemption, and to apply the proceeds of such sale, after deducting all necessary expenses of such sale, to the payment of funds on deposit in the said The Commercial National Bank of Washington to the credit of the United States Shipping Board Merchant Fleet

Corporation, any surplus remaining from the proceeds of the sale of such securities after such payment has been made, to be paid to the said The Commercial National Bank of Washington.

Upon the payment and return on demand in writing of all funds on deposit in said The Commercial National Bank of Washington to the credit of the United States Shipping Board Merchant Fleet Corporation by the said The Commercial National Bank of Washington, the said United States Shipping Board Merchant Fleet Corporation agrees to and will return upon demand in writing by the said The Commercial National Bank of Washington, all the aforesaid securities, including substitutes, referred to herein.

The right is hereby reserved on behalf of the said The Commercial National Bank of Washington to pay or return in full such
29 deposits of the United States Shipping Board Merchant Fleet Corporation at any time and upon so doing to receive from said United States Shipping Board Merchant Fleet Corporation the securities deposited under the terms hereof.

In witness whereof, the said The Commercial National Bank of Washington has caused this agreement, and the duplicate thereof, to be signed in its corporate name by Wade H. Cooper, its president, and its corporate seal to be hereunto affixed and attested by Walter J. Harrison, its Secretary, this 19th day of November, 1931.

THE COMMERCIAL NATIONAL BANK OF WASHINGTON,
By WADE H. COOPER, *President.*

Attest:
WALTER J. HARRISON, *Secretary.*

O. K.
R. D. Q.

Received of The Commercial National Bank of Washington, D. C., this — day of November, 1931, the above-described securities under the terms and conditions above mentioned.

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION,
By HEBER M. WELLS, *Treasurer.*

Approved:
CHAUNCEY G. PARKER.

Endorsed:
U. S. S. B. M. F. C.

30 "*Exhibit B-2*"

Description and list of various and sundry bonds pledged by the Commercial National Bank of Washington, D. C. to United States Shipping Board Merchant Fleet Corporation.

Par value	*Description*
$100,000 U. S. Treas	3¼% Bonds of 6/15/46-49.
75,000 U. S. Treas	3⅜% Bonds of 3/15/43.
25,000 U. S. Treas	3¼% Bonds of 3/15/46-56.
200,000 4th Liberty Loan	4¼% Bonds of 10/15/33-38.

"*Exhibit C-1*"

This agreement, made at Washington, District of Columbia, this 11th day of May, 1910, between the Secretary of War, the executive officer of the United States charged by the President with supervision and control over the governmental affairs of the Canal Zone, and the

Commercial National Bank, of Washington, District of Columbia, a corporation organized and existing under the banking laws of the United States, hereinafter called the Bank, in renewal and amendatory of an agreement entered into by and between the Government of the Canal Zone and the Commercial National Bank, under date of January 19, 1909, witnesseth:

ARTICLE I. The administrative officers of the Canal Zone have collected and received, and will continue to collect and receive, hold, deposit, disburse, and expend, municipal, administrative district and various other funds, deposits, postal funds, and other obligations, securities, funds and moneys which may come into their custody, and the Secretary of War desires to secure a safe and sure place for the deposit, custody, safe-keeping and disbursement of said moneys and funds, and also an expeditious and effective method of auditing, inspecting, examining, transferring and disbursing the said moneys and funds.

ARTICLE II. The Bank guarantees that it has a suitable place therefor, and is prepared to undertake the custody and safe-keeping of and accounting for said moneys and funds, which said suitable place for said services is the banking house or place of business of the said Commercial National Bank.

ARTICLE III. There was on deposit with the Bank on March 1, 1910, under the original agreement of January 19, 1909, One Million Two Hundred and Fifty-four Thousand, Seven Hundred and Fifty-four Dollars and Ninety-two Cents ($1,254,754.92), and there will be left on deposit with said Bank hereafter such part of the moneys and funds covered by this agreement as may be found convenient or necessary. The deposits, if any are made, will be made in such amounts and at such times as may be practicable and convenient to the Treasurer of the Canal Zone or to other officers or agents duly authorized by the Secretary of War.

ARTICLE IV. The Bank, in consideration of the benefits it will derive from being made such place of deposit, the mutual entering into of the agreement herein set forth, and the deposit with it of such moneys and funds, undertakes and agrees to receive and safely keep and disburse and properly account for all moneys and funds deposited with and turned over to it by the Treasurer of the Canal Zone or by other agents, or representatives of the Secretary of War.

ARTICLE V. The Bank undertakes and agrees to pay on all moneys and funds covered by this agreement interest at the rate of three (3) per centum per annum from March 1, 1910, to a date not later than July 1, 1910, on which the deposit shall be reduced to Five Hundred Thousand Dollars ($500,000.00), more or less, computed on the minimum balance for each month or part of month, as follows:

Interest for March and April shall be computed on the minimum monthly balance to the credit of the account during each of those months.

Interest on and after May 1st shall be computed, for the first period, on the minimum balance between May 1st and the date the first check transferring part of the deposit to The Riggs National Bank, of Washington, D. C., is paid; for the second period, on the minimum balance between the date the first check transferring part of the deposit to The Riggs National Bank is paid and the date the second check is paid; for the third period, on the minimum balance be-

tween the date the second check is paid and the date the third check is paid; for the fourth period, on the minimum balance between the date the third check is paid and the date the fourth check is paid, which shall be on or before July 1, 1910.

From July 1, 1910, or from the date the fourth check transferring the balance of the deposit above Five Hundred Thousand Dollars ($500,000.00) more or less, to The Riggs National Bank has been paid by the Bank, interest shall be due and payable at the rate of two (2) per centum per annum, to be computed on the minimum balance to the credit of the account during each calendar month and any part of month occurring after said fourth check is paid. Interest shall be payable semi-annually and shall be placed to the credit of the account on September 1st and March 1st of each year during the continuance of this agreement. Should this agreement be terminated and the account closed during any semi-annual period, interest shall be due and payable to and on the date of such termination of the agreement and closing of the account, interest for a fractional part of a month being payable on the minimum balance to the credit of the account during such fractional part of a month.

33 ARTICLE VI. The Bank agrees to accept, and pay, without charge or discount, all bills, drafts and checks drawn upon it by the Secretary of War, the Treasurer of the Canal Zone, or by other officers or persons duly authorized for that purpose, when said bills, drafts or checks are properly presented or come to it for acceptance or payment, and drawn against said moneys and funds so deposited, and will promptly account for all moneys and funds received and pay over the balance at any time remaining in its hands of all and any moneys and funds so received by it to the said Treasurer of the Canal Zone, or other officers or persons duly authorized for the purpose by the Secretary of War, or by his succeeding lawfully designated governing authority of the Canal Zone, when called upon so to do.

ARTICLE VII. The Bank on the first day of each month and at such other times as it may be requested to do so shall render a statement of deposits and payments covering the preceding month, or part of month, to the Treasurer of the Canal Zone, or to such other officers or persons as shall be duly authorized for that purpose, and its books of account shall at all times show the amount of moneys and funds in the keeping of said Bank deposited under this agreement.

ARTICLE VIII. This agreement shall continue in force until terminated on written notice which may be given at any time by either party to the other. Provided, however, that this agreement shall be immediately terminated should Congress by law direct its termination or give instructions concerning the funds covered by this contract inconsistent with the terms hereof. In case this contract is terminated the Bank shall immediately pay to the Secretary of War, the Treasurer of the Canal Zone, or other officers or agents duly authorized for the purpose, any balance remaining to the credit of the account.

34 ARTICLE IX. As security for the safe-keeping and prompt payment of the moneys and funds deposited under this agreement and the faithful performances thereof, the Bank has deposited

with Captain P. C. Boggs, Corps of Engineers, U. S. A., General Purchasing Officer of the Isthmian Canal Commission, bonds of the par value of One Million Two Hundred and Ninety-four Thousand Dollars ($1,294,000.00), said bonds being now deposited in the vaults of the American Security and Trust Company, under an agreement dated February 10, 1909, and renewed by letter of February 9, 1910, copies of which are attached hereto, and, after a par of the bonds are withdrawn, will, if practicable, be deposited in a smaller safe in the vaults of said Trust Company under a continuing agreement to be substituted therefor, which agreement, when executed, shall become a part of this contract. The Bank agrees to maintain at all times during the continuance of this agreement the same or other acceptable bonds in such amount that the moneys and funds deposited under this agreement will at all times be fully secured by bonds of the following classes and at the values specified:

United States, Philippine, Porto Rico and District of Columbia bonds will be accepted at par.

Bonds of the Hawaiian Territory at ninety (90) per cent, and, if otherwise satisfactory to the Secretary of War or his representative, Philippine Railway Company bonds and those of States, municipalities and high-grade railroads such as are legal investments for savings banks in the States of New York, Massachusetts, Connecticut, or New Jersey, at ninety (90) per cent of their market value, but not exceeding ninety (90) per cent of their par value.

The Bank shall have the right, as deposits are withdrawn to withdraw its bonds correspondingly, and at any time to substitute other bonds acceptable as above of equal market value, for the bonds then on deposit.

In the absence or disability of Captain Boggs, his representative or successor as custodian of said bonds, shall be designated by or with the approval of the Secretary of War.

ARTICLE X. The Bank agrees that the said bonds are now and will hereafter be deposited as security for the safe-keeping and prompt payment of the moneys and funds deposited with it, and for the faithful performance of all provisions of this agreement, and in the event that the Bank fails to make prompt payment or fails to safely keep the moneys and funds deposited with it, or otherwise fails to faithfully perform all the provisions of this agreement, it is agreed by the bank that said bonds shall become the property of the Secretary of War and may be either retained by him or may be sold, transferred and conveyed, in whole or in part, by the said Secretary of War or his duly authorized agent, as his absolute property, and the proceeds realized from the said sale or sales shall be applied by the said Secretary of War or his agent, to the liquidation of any amount due by the bank under this agreement, any residue thereof after said liquidation to be delivered to the Bank.

ARTICLE XI. All or any acts which may be performed, and all or any orders which may be given, by the Secretary of War under this agreement, may be performed or be given by the Acting Secretary of War with the same force and effect as if they were performed or given by the Secretary of War himself.

In witness whereof, the Secretary of War has signed this agreement in triplicate, and the Bank has caused it to be signed likewise
36 in triplicate by its proper officers and its corporate seal affixed thereto the day and year first above written.

In the presence of:

(Signed) W. R. PEDIGO.

(Signed) J. M. DICKINSON,
Secretary of War.

COMMERCIAL NATIONAL BANK,

[SEAL] By (Signed) A. G. CLAPHAM,
as its Vice-President.

Attest:

(Signed) JOHN POOLE,
as its Secretary

"Exhibit C–2"

Description and list of various and sundry bonds pledged by commercial National Bank of Washington, D. C. to A. L. Flint, General Purchasing Officer and Chief of Washington Office the Panama Canal.

Par value	Description
$30,000.00	Federal Farm Loan 4¼% Bonds of July 1, 1936–56.
185,000.00	Federal Farm Loan 4½% Bonds of Jan. 1, 1953.
10,000.00	Great Northern Ry. Co., General 7's of July 1, 1936.
25,000.00	Chicago & Northwestern Ry., 15 year 6½% Bonds of March 1, 1936.
30,000.00	Buffalo, Rochester & Pittsburgh 5's of Sept. 1, 1937.
25,000.00	Colorado & Southern Ry. 4½% of May 1, 1935.
25,000.00	Lake Erie & Western Ry., First 5% of Jan. 1, 1937.
7,000.00	Duluth & Iron Range Ry. First 5's of Oct. 1, 1937.
5,000.00	Ohio River R. R. Co., General 5's of April 1, 1937.
35,000.00	Federal Farm Loan Bonds, 4½% of Jan. 1, 1935–55.
5,000.00	Federal Farm Loan Bonds, 4¾% of July 1, 1934–54.
20,000.00	Federal Farm Loan Bonds, 4¼% of May 1, 1937–57.
13,000.00	New York, Philadelphia & Norfolk, R. R., 1st 4's of Jan. 1, 1939.
14,000.00	Long Island R. R. Co., General 4's of June 1, 1938.
40,000.00	Delaware & Hudson R. R. 5½'s of May 1, 1937.
37 5,000.00	Cleveland, Cinn. Chicago & St. Louis, Cairo Div. 4's of Jan. 1. 1939.
5,000.00	Cleveland, Cinn., Chicago & St. Louis (White Water Div.) 4's of July 1, 1940.
2,000.00	Cleveland, Cinn., Chicago & St. Louis, Springfield & Columbus Div., 1st 4's of Sept. 1, 1940.
40,000.00	Federal Farm Loan 4½'s of May 1, 1932–42.
$791,000.00	Total.

Exhibit "C–3"

WAR DEPARTMENT.
Washington, June 16, 1933.

MR. A. L. FLINT,
General Purchasing Officer and Chief of Office,
The Panama Canal, Washington, D. C.

DEAR MR. FLINT: As authorized by the terms of Article X of the contract entered into on May 11, 1910, by and between the Secretary of War and the Commercial National Bank, providing that "in the

event that the Bank fails to make prompt payment or fails to safely keep the moneys and funds deposited with it, or otherwise fails to faithfully perform all the provisions of this agreement, it is agreed by the Bank that said bonds" (the bonds deposited as security for the safe-keeping and prompt payment of Canal Zone funds deposited with the Bank) "shall become the property of the Secretary of War and may be either retained by him or may be sold, transferred and conveyed, in whole or in part, by the said Secretary of War or his duly authorized agent, as his absolute property * * *," you are hereby directed on my behalf to take over such bonds as the absolute property of the Canal Zone.

38 You are authorized to enter into an agreement with the Receiver of the Commercial National Bank as to the present market value of the bonds at which they will be taken over, which agreement, it is understood, will be subject to the approval of the Comptroller of the Currency.

Yours very truly,

(S) GEORGE H. DERN,
Secretary of War.

Exhibit "D-1"

Description and list of various and sundry bonds pledged by the Commercial National Bank of Washington, D. C., to the Alien Property Custodian of the United States.

Par value	Description
$33,000.00	Baltimore and Ohio Railroad, Toledo-Cincinnati Division First Lien 4's of 7/1/59.
50,000.00	Rio Grande & Western Railway First 4's of July 1, 1939.
25,000.00	St. Paul, Kansas City, Short Line Railroad, First Mortgage 4½'s of 2/1/41.
25,000.00	Chicago, Rock Island and Pacific Railway, Series A, 4½'s of September 1, 1952.
75,000.00	Kansas City, Fort Scott and Memphis Railway 4's of October 1, 1936.
25,000.00	New York, Central and Hudson River Debentures 4's of May 1, 1934.
80,000.00	Milwaukee and Northern Railway First Mortgage Extended 4½'s of June 1, 1934.
25,000.00	Denver and Rio Grande Railroad First Consolidated 4's of January 1, 1936.
25,000.00	Kansas City, Memphis and Birmingham Railway 5's of March 1, 1934.
20,000.00	City of Atlantic City, New Jersey, 5's of February 1, 1936.
5,000.00	New York, Chicago and St. Louis Railroad 5's, Series M of August 1, 1936.
9,000.00	Grand Rapids and Indiana Railroad Second 4's of October 1, 1936.
3,000.00	City of Toronto, Canada, 5's of October 1, 1935.
6,000.00	Cincinnati, Hamilton and Dayton Railway Second 4's of January 1, 1937.
5,000.00	Adirondack Railway Company First 4½'s of March 1, 1942.
25,000.00	United States Treasury 3¾% Bonds of March 15, 1936/46.
17,000.00	Pacific Railroad of Missouri, First Mortgage 4's of August 1, 1938.
4,000.00	Carolina, Clinchfield and Ohio Railway First Mortgage 5's of June 1, 1938.
$407,000.00	

39

Exhibit D 2

Description and list of pledged bonds sold by the Alien Property Custodian together with amounts derived from the sales and dates of sales:

Par value	Description	Proceeds derived from sale	Date
$1,000.00	Baltimore and Ohio Railroad, Toledo-Cincinnati Division, First Lien 4's of 7/1/59.	$493.06	April 5, 1933.
1,000.00	Baltimore and Ohio Railroad, Toledo-Cincinnati Division, First Lien 4's of 7/1/59.	483.72	April 12, 1933.
6,000.00	Baltimore and Ohio Railroad, Toledo-Cincinnati Division, First Lien 4's of 7/1/59.	3,057.34	March 27, 1933.
1,000.00	Baltimore and Ohio Railroad, Toledo-Cincinnati Division, First Lien 4's of 7/1/59.	470.17	April 25, 1933.
2,000.00	Baltimore and Ohio Railroad, Toledo-Cincinnati Division, First Lien 4's of 7/1/59.	940.33	April 25, 1933.
50,000.00	Rio Grande and Western Railway First 4's of July 1, 1939	24,508.34	April 25, 1933.
15,000.00	St. Paul, Kansas City, Short Line Railroad First Mortgage 4½'s of 2/1/41.	5,460.00	March 23, 1933.
8,000.00	St. Paul, Kansas City, Short Line Railroad First Mortgage 4½'s of 2/1/41.	2,913.01	March 24, 1933.
2,000.00	St. Paul, Kansas City, Short Line Railroad First Mortgage 4½'s of 2/1/41.	718.00	March 23, 1933.
25,000.00	Chicago, Rock Island and Pacific Railway, Series A, 4½'s of 9/1/52.	5,784.40	March 24, 1933.
5,000.00	Kansas City, Fort Scott & Memphis Railway 4's of October 1, 1936.	1,737.50	April 7, 1933.
4,000.00	Kansas City, Fort Scott & Memphis Railway 4's of October 1, 1936.	1,391.25	April 7, 1933.
13,000.00	Kansas City, Fort Scott & Memphis Railway 4's of October 1, 1936.	4,517.50	April 6, 1933.
21,000.00	Kansas City, Fort Scott & Memphis Railway 4's of October 1, 1936.	7,407.50	April 10, 1933.
21,000.00	Kansas City, Fort Scott & Memphis Railway 4's of October 1, 1936.	7,297.50	April 10, 1933.
11,000.00	Kansas City, Fort Scott & Memphis Railway 4's of October 1, 1936.	3,962.50	April 11, 1933.
8,000.00	New York, Central & Hudson River Debenture 4's of May 1, 1934.	5,204.00	April 13, 1933.
12,000.00	New York, Central & Hudson River Debenture 4's of May 1, 1934.	7,513.83	April 17, 1933.
5,000.00	New York, Central & Hudson River Debenture 4's of May 1, 1934.	3,130.28	April 18, 1933.
25,000.00	Denver & Rio Grande Railroad First Consolidated 4's of Jan. 1, 1936.	8,180.55	March 24, 1933.
5,000.00	Kansas City, Memphis & Birmingham Railway 5's of March 1, 1934.	2,340.97	April 12, 1933.
10,000.00	Kansas City, Memphis & Birmingham Railway 5's of March 1, 1934.	5,411.11	March 27, 1933.
10,000.00	Kansas City, Memphis & Birmingham Railway 5's of March 1, 1934.	4,869.44	April 3, 1933.
5,500.00	New York, Chicago & St. Louis Railroad 5's, Series M of August 1, 1936.	3,010.42	March 22, 1933.
9,000.00	Grand Rapids & Indiana Railroad Second 4's of October 1, 1936.	7,821.00	March 22, 1933.
3,000.00	City of Toronto, Canada, 5's of October 1, 1935	2,801.25	March 22, 1933.
6,000.00	Cincinnati, Hamilton & Dayton Railway Second 4's of January 1, 1937.	5,154.76	April 4, 1933.
25,000.00	United States Treasury 3¼% Bonds of March 15, 1956/46	25,734.38	March 20, 1933.
15,000.00	Pacific Railroad of Missouri, First Mortgage 4's of August 1, 1938.	11,095.83	April 6, 1933.
2,000.00	Pacific Railroad of Missouri, First Mortgage 4's of August 1, 1938.	1,666.78	March 24, 1933.
4,000.00	Carolina, Clinchfield & Ohio Railway First Mortgage 5's of June 1, 1938.	3,492.22	March 23, 1933
		168,568.94	
	Coupons collected	468.75	
		169,037.69	

40 *Exhibit E-1*

Know All Men by These Presents.

That the Commercial National Bank, Washington, D. C., a corporation existing under the laws of The District of Columbia, is held and firmly bound unto the Government of the Philippine Islands in the sum of One Million ($1,000,000) dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, the said corporation does hereby bind itself, its successors and assigns, firmly by these presents.

The condition of the foregoing obligation is such that:

Whereas, the Government of the Philippine Islands desires to secure a safe and secure place for the deposit, custody and safe-keeping of moneys and funds collected or received by it in its governmental capacity, or under its custody and control; and an expeditious and effective method of auditing, inspecting, examining, transferring and disbursing said moneys and funds; and

Whereas, the said Commercial National Bank, hereinafter referred to as said corporation, has a suitable place therefor, and is prepared to undertake the custody, safe-keeping and accounting of said funds, said suitable place for said services being the banking house of said corporation in the City of Washington, D. C.

And whereas, it has been and is hereby agreed between the Government of the Philippine Islands and the said corporation as follows, namely:

(a) That the Government of the Philippine Islands will deposit with the said corporation at its banking house in the City of Washington, D. C., moneys and funds received by it, in its governmental capacity or under its custody or control, from time to time in
41 such amounts as it may find convenient; the Government of the Philippine Islands reserving, however, the right to terminate this agreement at any time without notice or liability to the said corporation.

(b) That the said corporation, in consideration of the benefits that it derives from its banking house being made such place of deposit, undertakes and agrees to receive on deposit, safely keep, disburse, and properly account for, all moneys deposited or turned over *or* it by the officers, agents or representatives of the Government of the Philippine Islands; to promptly honor and pay such checks or drafts as the said Government or its duly authorized agent, may draw against said deposits; and to pay over all balances at any time remaining in its hands of all and any moneys so received by it to the said Government of the Philippine Islands or its duly authorized agent, when called upon so to do.

(c) The said corporation further agrees to deposit with the Chief of the Bureau of Insular Affairs of the War Department from time to time, for and on account of the Government of the Philippine Islands, securities satisfactory to the Secretary of War in an amount sufficient, at their market value, and with required margins to fully cover all deposits made with said corporation of funds belonging to, in the custody of, or under the control of, the Government of the Philippine Islands, up to but not exceeding the amount of One

Million (1,000,000) dollars; and has agreed and does hereby agree to maintain at all times during the continuance of this agreement, the same or other securities satisfactory to the Secretary of War at all times to be kept in an amount, at market price with the required margins, sufficient fully to cover any and all deposits of such funds with said corporation belonging to, in the custody of, or under the control of, the Government of the Philippine Islands. Pro-
42 vided that other securities, of equal market value, to be approved by the Secretary of War, may, at any time during the continuance of this agreement, be substituted for the securities then on deposit, upon notice to the Chief of the Bureau of Insular Affairs. Said corporation further agrees that said securities shall be held, used, and controlled, and, in the event of the failure to carry out all or any of the provisions of this obligation, shall be owned and may be sold, transferred, or conveyed, in whole or in part, by the Government of the Philippine Islands as its absolute property at public or private sale and with or without notice to said corporation; *Provided, however*, that in case the said Government shall realize on said securities an amount in excess of the indebtedness of the said corporation to the Government of the Philippine Islands thereby secured, such excess, after deducting all expenses incurred in the sale or disposal of such securities, shall be paid to the said corporation, its duly authorized agent or its legal representatives.

Now, therefore, if said Commercial National Bank shall well and truly observe and perform all and singular the obligations incumbent upon it by reason of said agreement, then the above obligation shall be null and void; otherwise to remain in full force and effect.

In witness whereof, the said corporation has caused its name and corporate seal to be signed and affixed to these presents by its undersigned officers, thereunto duly authorized this Fourth day January, 1923.

(Signed) COMMERCIAL NATIONAL BANK,
By J. H. BADEN,
as its Vice President.
L. A. SLAUGHTER,
Vice Prest.
and
WALTER J. HARRISON,
as its Secty.

Approved as to form and execution:
LAW OFFICER,
Bureau of Insular Affairs.

43 Approved F. MC I.
(Signed) JOHN W. WEEKS,
Secretary of War.

Exhibit "E-2"

Schedule of bonds deposited with Brigadier General F. Le J. Parker, Chief of Bureau of Insular Affairs, Munitions Building, Washington, D. C., to secure "Treasurer of the Philippine Islands,

Treasury certificate fund account, demand deposit, which bonds are held in safekeeping by the Federal Reserve Bank of Richmond, Virginia.

Par value	Description
$58,000.00	Federal Farm Loan, Federal Land Bank Bonds, 4¾% of July 1, 1933–53.
$229,000.00	Federal Farm Loan, Federal Land Bank Bonds, 4¾% of July 1, 1934–54.
31,000.00	Federal Farm Loan, Federal Land Bank Bonds, 4½% of January 1, 1933–43.
66,600.00	Federal Farm Loan 4½% Bonds of May 1, 1992–42.
11,000.00	Federal Farm Loan 4½% Bonds of July 1, 1933–53.
95,000.00	Federal Farm Loan 4¼% Bonds of May 1, 1937–57.
100,000.00	U. S. Treasury 3¾% Bonds of March 15, 1956.
487,000.00	U. S. Treasury 3⅜% Bonds of March 15, 1941–43.
$1,077,000.00	

Exhibit "E–3"

DISTRICT OF COLUMBIA,
City of Washington, ss:

Personally appeared before me, the undersigned, a notary public in and for the said City and District, Edward A. Stockton, Jr., who being duly sworn, says that he, the said Edward A. Stockton, Jr., is a duly appointed and qualified Lieutenant Colonel of Coast Artillery, United States Army; and that under the immediate direction
44 of the Acting Chief of the Bureau of Insular Affairs, and with consent of the Supervising Receiver Insolvent Banks of the Treasury Department given on February 28, 1933, and with the written approval of the Secretary of War, sold on March 1st and 2nd, by competitive bidding, the securities deposited by The Commercial National Bank of Washington, D. C., as collateral to secure a deposit of Philippine public funds with that bank; that the attached inclosurse numbered 1 to 4 include true copies of the slips received from the brokers purchasing the bonds as a result of the aforesaid sale; that the total amount realized by the sale of the collateral was $997,448.33; that the sales were consummated by the delivery of the bonds through The Chase National Bank of New York to the purchasers against payment of the agreed purchase prices; that the money received in payment of these bonds was deposited in The Chase National Bank to the credit of the Treasurer of the Philippine Islands Treasury Certificate Fund Account, Demand Deposit.

[SEAL] (Signed) Edward A. Stockton, Jr.,
EDWARD A. STOCKTON, JR.,
Lieutenant Colonel, Coast Artillery, United States Army,
Assistant to Chief, Bureau of Insular Affairs,
Munitions Building, Washington, D. C.

Subscribed and sworn to this 7th day of April, 1933, as witness my hand and official seal.

[SEAL]. (Signed) C. C. COOMBS,
Notary Public.

45 *Exhibit "E-4"*

Description and list of pledged bonds sold by the Treasurer of the Philippine Islands, together with amounts derived from the sales and dates of sales.

Par value	Description	Date of sale	Proceeds derived from sales
$58,000.00	Federal Farm Loan Bonds, Federal Land Bank Bonds, 4¼% of July 1, 1933/53	March 1, 1933	$46,338.98
229,000.00	Federal Farm Loan Bonds, Federal Land Bank Bonds, 4¼% of 7/1/34-54	March 1, 1933	190,484.28
31,000.00	Federal Farm Loan Bonds, Federal Land Bank Bonds, 4½% of 1/1/33-43	March 1, 1933	26,276.38
66,000.00	Federal Farm Loan 4½% Bonds of May 1, 1932-42	March 1, 1933	56,240.26
11,000.00	Federal Farm Loan 4½% Bonds of July 1, 1933-53	March 1, 1933	9,230.38
95,000.00	Federal Farm Loan 4¼% Bonds of May 1, 1937-57	March 1, 1933	78,585.13
100,000.00	United States Treasury 3¼% Bonds of March 15, 1956	March 1, 1933	102,364.58
487,000.00	United States Treasury 3¼% Bonds of March 15, 1941-43	March 1, 1933	487,928.34
			$997,448.33

Exhibit "E5"

ROBERT C. BALDWIN, *Receiver,*
Commercial National Bank of Washington:
To Treasurer of the Philippine Islands:
Charge to: O-1 & U.
Voucher No. 1713.
Address, Washington, D. C.
Date, November 14, 1933.

Date	For—	Amount
	Lia. #16183—Treasurer of the Philippine Islands: Received of Robert C. Baldwin, Receiver of The Commercial National Bank of Washington, the sum of $6,154.41 in full settlement of the balance of an account in the name of Treasurer of the Philippine Islands, together with accrued interest, the acceptance of which sum operates as a full and complete release of the said Robert C. Baldwin as Receiver of The Commercial National Bank of Washington from any future claim arising out of the said account	$6,154.41

Approved by office letter dated November 10, 1933.
Received from Robert C. Baldwin, Receiver of the Commercial National Bank of Washington, D. C., $6,154.41 in full settlement of the within described account.

(Signed) TREASURER OF THE PHILIPPINE ISLANDS,
By (s) CREED F. COX,
Chief, Bureau of Insular Affairs, Payee.

Approved:
ROBERT C. BALDWIN.
By (s) R. W. WINTER.

Exhibit "E–5"

Treasurer of the Philippine Islands-- Liability No. 16183

Date bonds deposited	Par value	Bonds	Principal	Int.	Total	Book value	Net loss
Mar 17, 1931	$487,000.00	U. S. Treas. 3¼ of 3/15/41–43	$480,303.75	$7,624.59	$487,928.34	$490,956.88	$3,028.54
Oct 8, 1930	100,000.00	U. S. Treas. 3¼ of 3/15/46–56	100,625.00	1,739.58	102,364.58	106,875.00	4,510.42
Oct 8, 1930	5,000.00	Fed. Farm Loan 4¼ of 5/1/37–57	3,750.00	72.01	3,822.01		
Oct 8, 1930	25,000.00	Fed. Farm Loan 4¼ of 5/1/37–57	20,375.00	392.53	20,767.53	95,950.00	17,364.87
Oct 8, 1930	65,000.00	Fed. Farm Loan 4¼ of 5/1/37–57	52,975.00	1,020.59	53,995.59		
Oct 8, 1930	66,000.00	Fed. Farm Loan 4½ of 5/1/32–42	55,209.00	1,031.26	56,240.26	66,986.25	10,745.99
Oct 8, 1930	31,000.00	Fed. Farm Loan 4½ of 1/1/33–43	26,040.00	236.38	26,276.38	31,460.87	5,184.49
25M Dec. 8, 1925							
6M Oct. 8, 1930							
Oct. 8, 1930	11,000.00	Fed. Farm Loan 4½ of 7/1/33–53	9,130.00	100.38	9,230.38	11,206.25	1,975.87
Dec. 8, 1925	48,000.00	Fed. Farm Loan 4¾ of 7/1/33–53	37,500.00	392.67	37,892.67		
" 8, 1925	6,000.00	" " " " "	5,010.00	57.79	5,067.79		
" 8, 1925	2,000.00	" " " " "	1,670.00	19.26	1,689.26		
" 8, 1925	2,000.00	" " " " "	1,670.00	19.26	1,689.26		
40M " 8, 1925	100,000.00	Fed. Farm Loan 4¾ of 7/1/34–54	83,650.00	857.64	84,507.64	235,984.56	45,500.28
60M Oct. 28, 1932							
Dec. 8, 1925	54,000.00	" " " " "	42,187.50	441.75	42,629.25		
" 8, 1925	18,000.00	" " " " "	15,030.00	173.37	15,203.37		
" 8, 1925	50,000.00	" " " " "	41,750.00	481.60	42,231.60		
" 8, 1925	7,000.00	" " " " "	5,845.00	67.42	5,912.42		
Total			$982,720.25	$14,728.08	997,448.33	$1,099,341.06	$101,892.73
Balance due Treasurer of the Philippine Islands at suspension, including interest to suspension					$1,003,602.74		
Deficiency					$6,154.41		

47 *Separate answer of United States Shipping Board Merchant Fleet Corporation*

Filed September 19, 1935

* * * * * * * *

Comes now the defendant, United States Shipping Board Merchant Fleet Corporation, and for its separate answer to plaintiff's Bill of Complaint, defendant says:

1. It admits the allegations contained in Paragraph 1 of the Bill of Complaint.

2. It has no knowledge as to the truth of the allegations contained in Paragraph 2 of the Bill of Complaint.

3. It admits that this defendant is a corporation organized and existing under the laws of the District of Columbia and is located in said District, as alleged in Paragraph 3 of the Bill of Complaint. It denies that this defendent is doing any business in said District or anywhere else, except as a duly authorized agent of the United States, as hereinafter expressly set forth.

4. It admits that defendant, George H. Dern is a citizen of the United States and a resident of the District of Columbia, and that said defendant is Secretary of War of the United States, as
48 alleged in Paragraph 4 of the Bill of Complaint. It has no knowledge as to the truth of the other allegations contained in said paragraph.

5. It has no knowledge as to the truth of the allegations contained in Paragraph 5 of the Bill of Complaint.

6. It has no knowledge as to the truth of the allegations contained in Paragraph 6 of the Bill of Complaint.

7. It has no knowledge as to the truth of the allegations contained in Paragraph 7 of the Bill of Complaint.

8. It admits that defendant Homer S. Cummings is a citizen of the United States and a resident of the District of Columbia and that he is Attorney General of the United States. It has no knowledge as to the truth of the other allegations contained in Paragraph 8 of the Bill of Complaint.

9. It admits the allegations contained in Paragraph 9 of the Bill of Complaint.

10. It has no knowledge of, interest in or concern with the allegations contained in Paragraph 10 of the Bill of Complaint and said allegations state no cause of action against this defendant.

11. Answering Paragraph 11 of the Bill of Complaint, this defendant denies each and every allegation contained therein, except those allegations hereinafter expressly admitted.

It admits that the name of this defendant was changed from United States Shipping Board Emergency Fleet Corporation to United States Shipping Board Merchant Fleet Corporation by the provisions of the Appropriation Act (Public No. 600—69th Congress), making appropriations for the United States Shipping Board for the fiscal year ending June 30, 1928.

49 It admits that on or about August 18, 1917, the United States Shipping Board Emergency Fleet Corporation, which was the former name of this defendant corporation, opened a deposit account in the Commercial National Bank of Washington and that

from time to time this defendant made deposits in said bank which were credited in said account, but this defendant denies that the said account was open on the books of said bank at the time said bank closed its doors and suspended operations and says that the deposit account opened on or about August 18, 1917, as aforesaid, was closed on or about August 5, 1918.

It admits that the date said bank closed its doors and suspended operations, to-wit, on February 27, 1933, there was a balance of public funds amounting to $264.302.16 credited to this defendant on the books of said bank in another account entitled "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account," which has been opened with said bank on or about December 1, 1921, pursuant to a resolution of the Board of Trustees of this defendant passed that day, which is hereinafter set forth in Paragraph 23 of this Answer. It says that by letter to said Bank, dated June 14, 1923, notice was given to said Bank that this defendant was acting solely as an agent of the United States Shipping Board, that this defendant had no beneficial interest in the account then carried in said Bank and that the title of said account should be changed to "United States Shipping Board Emergency Fleet Corporation, Agent, Deposit Account." Thereafter, the account was so carried by said Bank until defendant's name was changed and thereafter the account was carried on the books of said bank under the name, caption, and designation, "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit, Account."

50 It admits that at the time of the suspension and closing of said bank, on February 27, 1933, there was a balance of public funds amounting to $144.995.12 credited to this defendant on the books of said bank in another deposit account which had been opened by this defendant on January 14, 1926, and which was carried under the name, caption, and designation, "United States Shipping Board Merchant Fleet Corporation, Agent, Good Faith Deposit Account."

It admits that continuously from the time of the opening of said account designated "Agent, Good Faith Deposit Account" until the name of this defendant was changed as aforesaid, this account was carried under the name, caption, and designation, "United States Shipping Board Emergency Fleet Corporation, Agent, Good Faith Deposit Account," but says that thereafter continuously for more than five years and until the said suspension of said bank the said account was carried under the name, caption, and designation, "United States Shipping Board Merchant Fleet Corporation, Agent, Good Faith Deposit Account."

It admits that this defendant had made deposits in said two accounts from time to time.

It admits that a first dividend of 20% and a second dividend of 30%, upon the outstanding claims against said Bank has been paid to certain depositors and creditors of said Bank as alleged in Paragraph 11 of said Bill of Complaint.

It admits that on November 19, 1931, said Bank duly executed and delivered to this defendant a certain instrument in writing and that Exhibit B-1, attached to the Bill of Complaint is a true copy thereof.

It admits that during the existence of said two deposit accounts said Bank pledged as security for the repayment of the public
51 funds on deposit in said Bank in said two accounts certain bonds of the par value of, to-wit, $400,000.00, which bonds are correctly described in Exhibit B-2 attached to the Bill of Complaint, but defendant expressly denies that said pledge was unlawful or illegal.

It says it is advised that plaintiff's allegations that there was no authority or capacity in said Bank to pledge said assets as security for said two deposits and that said bonds when pledged became a trust and were so held by this defendant for the benefit of said Bank, its depositors, creditors and share holders, are all conclusions of law which this defendant is not obligated to answer, but nevertheless, this defendant expressly denies each and every one of said conclusions of law, and upon the facts hereinafter set forth, says that the pledge of said securities was in all respects valid and legal and was and is binding upon said Bank and the depositors, creditors and stockholders thereof. It further says that the only obligation resting upon this defendant in favor of the Bank, its depositors, creditors or stockholders, was to pay to said Bank or its successor whatever surplus that might result upon liquidation of said bonds in excess of the amount required to fully satisfy the lien against said security, created as hereinafter set forth, and that this obligation was fully satisfied by the payment to the plaintiff on, to-wit, April 27, 1933, of the sum of $4,270.17, as admitted in Paragraph 11 of the Bill of Complaint.

It admits that after the closing of said Bank on February 27, 1933, and as a result of certain transactions consummated with the express consent of the plaintiff and with the express approval of the Comptroller of the Currency, which transactions are hereinafter set forth, this defendant's principal, the United States of America, has
52 received full and complete reimbursement for the balances of public moneys on deposit in said Bank to the credit of this defendant at the time said Bank was closed and suspended operations, together with interest on said balances; but this defendant denies that such reimbursement was accomplished in the manner set forth in Paragraph 11 of the Bill of Complaint and denies plaintiff's conclusions of law that the said reimbursement was erroneous and unlawful; and upon information and belief, this defendant says that the facts concerning said transactions were as follows:

After the said Bank closed and prior to March 8, 1933, the Treasurer of this defendant corporation conferred with certain officials of the Division of Insolvent National Banks in the office of the Comptroller of the Currency, which last named officer of the Government was then and still is charged by law with supervision over the affairs of said insolvent Bank, to determine what method should be pursued to safeguard and protect the interests of the United States in and to the public moneys deposited in said Bank to the credit of this defendant. As a result of said conference the president of this defendant corporation sent a letter to the Comptroller of the Currency under date of March 8, 1933, making inquiry as to whether this defendant might dispose of the bonds theretofore pledged by the said Bank as security for said deposits of public money. A true copy of said letter is hereto attached, marked Exhibit "A-1" and made a part hereof. As a result of said conference and said letter, the Deputy Comptroller of the Currency, by letter

dated March 17, 1933, transmitted to plaintiff a copy of defendant's letter (exhibit A–1) and authorized plaintiff to notify this defendant that plaintiff would interpose no objection to the sale of
53 the pledged securities and the application of the proceeds to payment of this defendant's deposit balances. A true copy of the Deputy Comptroller's said letter is hereto attached, marked Exhibit "A–2" and made a part hereof. The said Deputy Comptroller transmitted a copy of his said letter (exhibit A–2) to the president of this defendant corporation by letter dated March 17, 1933, a true copy thereof being hereto attached marked Exhibit "A–3", and made a part hereof. Thereupon, plaintiff notified this defendant he would interpose no objection to the sale of the pledged bonds and this defendant then delivered said bonds to the Treasurer of the United States for safe keeping. After such delivery was made and on April 4, 1933, the Chairman of the United States Shipping Board, by letter addressed to the Secretary of the Treasury, requested the Treasury Department to dispose of the pledged bonds and credit the proceeds thereof to the United States Treasury Account of the treasurer of this defendant corporation. A true copy of the Chairman's said letter is hereto attached, marked Exhibit "A–4" and made a part hereof. By two letters dated April 7, 1933, from plaintiff to this defendant, true copies thereof being attached hereto, marked Exhibit "A–5" and "A–6", respectively, and made a part hereof, plaintiff acknowledged the validity of the agreement therefofore made by said bank with this defendant whereby the Government bonds had been pledged by the bank as security for the deposits of public money maintained by defendant in said bank; and by said letters plaintiff requested the privilege of redeeming certain of said bonds which had a par value of $275,000 by payment to this defendant of a like sum in cash. Upon receipt of said letters
54 from plaintiff, the United States Shipping Board requested the Secretary of the Treasury orally and later by letter dated April 10, 1933, to refrain from selling said certain bonds at the par value of $275,000. Upon receipt of the Chairman's said letter (exhibit A–4) and the Shipping Board's oral modification thereof as aforesaid, the Under Secretary of the Treasury, by letter dated April 8, 1933, instructed the Federal Reserve Bank, New York City, that the Treasurer of the United States had been instructed to cancel and deliver to the Register of the Treasury for credit to the denominational account of said Federal Reserve Bank, $100,000 Treasury 3¼'s Bonds of 1946–49, and $25,000 Treasury 3¾'s Bonds of 1946–56, said bonds being some of the collateral pledged by said Commercial Bank of Washington with this defendant and delivered to the Treasurer of the United States as aforesaid. The said letter further instructed said Federal Reserve Bank to withdraw like face amounts of such Treasury Bonds as above described from its denominational exchange stocks and arrange for their sale on the market, the proceeds to be credited to the account of the treasurer of this defendant corporation. A true copy of said letter to the Federal Reserve Bank is hereto attached, marked Exhibit "A–7". Plaintiff's offer to redeem certain of said bonds having a par value of $275,000 by payment to this defendant of a like sum in cash was reported to the United States Shipping Board and acceptance of said offer was approved by that Board on April 11, 1933. By letter

dated April 12, 1933, from the Chairman of the United States Shipping Board to the Under-Secretary of the Treasury, a true copy thereof being hereto attached, marked Exhibit "A–8", and made a part hereof, the Treasury Department was advised of the United States Shipping Board's approval of plaintiff's offer and the Treasury Department was requested to handle the transaction
55 along the lines indicated in said letter, but the Comptroller General of the United States, by letter to the Chairman of the United States Shipping Board, dated April 14, 1933, objected to the proposed transaction on the ground that said bonds then possessed a market value greater than the par value thereof and the proposed redemption arrangement would result in a surrender of contractual rights of the United States without an adequate valuable consideration therefor. A true copy of the Comptroller General's letter is attached hereto, marked Exhibit "A–9", and made a part hereof. After further negotiations between plaintiff and defendant and the Comptroller of the Currency, it was mutually agreed that certain of the pledged bonds, namely, the Fourth, 4¼% Liberty Bonds of the par value of $200,000, and the United States Treasury 3⅜% Bonds of the par value of $75,000 with unmatured interest coupons attached, would be sold and delivered to plaintiff for the sum of $281,695.31 in cash. By letter dated April 18, 1933, from the Chairman of the United States Shipping Board to the Under-Secretary of the Treasury, copy thereof being hereto attached, marked Exhibit "A–10", and made a part hereof, the Treasury Department was advised of said revised agreement and requested to forward said bonds to the Federal Reserve Bank, New York City, for safe keeping and subject to the order of the Comptroller of the Currency for the benefit of the depositors of the Commercial National Bank of Washington, after the checks received by this defendant and deposited in the Treasury as hereinbefore set forth, had been collected. In completing said transaction the Treasury Department did not deliver to the Federal Reserve Bank of New York City the identical bonds theretofore pledged by said bank, but as appears from a letter from
56 the Assistant Secretary of the Treasury to the Deputy Governor of said Federal Reserve Bank, dated April 21, 1933, a true copy thereof being hereto attached, marked Exhibit "A–11", and made a part hereof, the Treasurer of the United States was instructed to cancel said bonds and deliver them to the Register of the Treasury for credit to the denominational exchange account of said Federal Reserve Bank and the Commissioner of the Public Debt authorized said Federal Reserve Bank to deliver and hold for safe keeping other similar bonds, subject to the order of the Comptroller of the Currency for the benefit of the depositors of the Commercial National Bank of Washington. The said officials of the Treasury Department and the Federal Reserve Bank, New York City, liquidated the interests of the United States in the bonds pledged by said bank with this defendant substantially in the manner authorized and directed in the said two letters of the Under-Secretary of the Treasury to said Federal Reserve Bank (exhibits A–7 and A–11), except that the proceeds derived from the sale of the bonds sold by the Federal Reserve Bank of New York City, which proceeds amounted to the sum of $125,460.94, were deposited in said Federal Reserve Bank to the "credit of the Treasurer of the

United States for account of Heber M. Wells, Treasurer, United States Shipping Board Merchant Fleet Corporation, under Symbol No. 93500", as appears from letter from the Assistant Deputy Governor of the Federal Reserve Bank of New York to the Under-Secretary of the Treasury, dated April 12, 1933, a copy thereof being hereto attached, marked Exhibit "A-12" and made a part hereof.

Defendant denies that it collected and retained the sum of $5,515.49 derived from the coupons affixed to the pledged bonds, but says that on April 5, 1933, it deposited uncashed matured interest coupons amounting to $1,734.24 with the Treasurer of the
57 United States and that on April 17, 1933, it also deposited in the Treasury of the United States check of the Treasurer of the United States theretofore received for the remainder of the matured interest coupons on said bonds. Defendant says that this liquidating of said matured interest coupons was pursued with the knowledge and consent of both the Comptroller of the Currency and plaintiff.

Defendant further says that as a result of the liquidation by the United States Treasury Department as above set forth of the interests of the United States in the bonds pledged by said bank as security for the deposits of public moneys made by this defendant in said Bank, the Treasurer of the United States had and received the sum of $125,460.94 as proceeds of the securities sold by the Federal Reserve Bank of New York City as aforesaid, the further sum of $281,695.31 proceeds of the checks drawn by the Comptroller of the Currency as aforesaid, and the further sum of $5,984.24 proceeds of the matured interest coupons deposited by this defendant as aforesaid, or a total of $413,140.49. Defendant further says that said proceeds were applied in liquidation of the balance of $264,125.05 in defendant's "Agent Deposit Account" in said bank on February 27, 1933, less an adjustment made in said account on March 29, 1933, amounting to $943.54, leaving a net balance of $263,181.51, plus interest accrued on the said balance up to February 27, 1933, amounting to $177.41, plus interest on said balance from February 28, 1933, to April 17, 1933, inclusive, amounting to $341.68, or a total applied to liquidation of said "Agent Deposit Account" of $263,700.30,
58 and said proceeds were also applied in liquidation of the balance of $144,883.62 in defendant's "Agent Good Faith Deposit Account" in said bank on February 27, 1933, plus interest on said balance to February 27, 1933, amounting to $111.50, and plus interest on said balance from February 28, 1933, to April 17, 1933, inclusive, amounting to $174.90, or a total of $145,170.02, making a gross total of $408,870.32 applied in liquidation of the interest of the United States in said pledged bonds. The difference between the total proceeds from said bonds, amounting to $413,140.49, and the $408,870.32 so applied, which difference amounts to $4,270.17, was paid to the plaintiff by this defendant on April 27, 1933. A tabulation showing in detail the application of the proceeds of said bonds is hereto attached, marked Exhibit "A-13" and made a part hereof.

This defendant denies that by reason of said transactions or any of them, a trust in favor of the depositors, creditors and stockholders of said bank was created and is enforceable by plaintiff against this defendant in this or any other proceeding.

For further answer to the allegations contained in Paragraph 11 of the Bill of Complaint, this defendant refers to Paragraphs 15 to 37, inclusive, of this answer.

12 to 14. It has no knowledge of, interest in or concern with the allegations contained in Paragraphs 12, 13 and 14 of the Bill of Complaint and said allegations state no cause of action against this defendant.

59 Further answering the Bill of Complaint this defendant says:

15. Under Act of Congress, approved September 7, 1916, (39 Statutes at Large, 728; U. S. C. Title 46, Sec. 801, et seq.), designated by the statutory name of "Shipping Act, 1916", provision was made for the creation of a Federal Board, to be appointed by the President of the United States and to be known as United States Shipping Board. Pursuant to said Act Commissioners were duly appointed by the President and confirmed by the Senate. The said Board organized in January 1917, and thereafter and up to August 10, 1933, acted as an independent Federal establishment, with all the powers and duties conferred upon it by said Shipping Act, 1916, and after June 5, 1920, with all the powers and duties conferred upon it by the Merchant Marine Act, 1920, and other Acts of Congress not herein specifically mentioned.

16. Section 11, Shipping Act, 1916, authorized the United States Shipping Board, if in its judgment such action was necessary to carry out the purposes of the said Act, to form under the laws of the District of Columbia one or more corporations, provided that the capital stock of such corporation or corporations should not exceed $50,000,000 and, for and on behalf of the United States, to subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation and do all other things with regard thereto necessary to protect the interests of the United States and to carry out the purposes of the Shipping Act, 1916. Immediately after the Congress declared war on the Imperial German Government on April 6, 1917, the United States, acting through the United States Shipping Board, entered upon an extensive shipbuilding program. To provide a
60 convenient agent for superintending and carrying out said program and to carry out the purposes of the Shipping Act, 1916, and pursuant to its provisions, the said Board caused to be incorporated, on April 16, 1917, under the laws of the District of Columbia, a Federal corporation, under the name "United States Shipping Board Emergency Fleet Corporation," which corporation under its present name, United States Shipping Board Merchant Fleet Corporation, is this answering defendant.

17. After its incorporation as aforesaid, and during the year 1917, the said United States Shipping Board, for and on behalf of the United States, subscribed to all the authorized capital stock of defendant corporation in the sum of $50,000,000 and caused said sum to be paid to this defendant from the Treasury of the United States. During its entire corporate existence the said sum of $50,000,000, so received by this defendant from the United States, has been all the money this defendant has ever possessed as private corporate funds and the said entire sum of $50,000,000 was disbursed, paid out and expended by this defendant prior to December 31, 1917. Since the last mentioned date this defendant has not received or possessed any private corporate funds of its own, and all of the funds that have

come into its possession or that have been under its control since December 31, 1917, have been funds appropriated by the Congress of the United States to be used and expended by defendant as an agent of the United States, or funds received by defendant as an agent of the United States from private sources and in which the defendant has possessed no equitable or beneficial corporate interest.

18. After its incorporation and up to June 5, 1920, all of this defendant's activities and transactions were carried on as an agent of the United States by virtue of powers directly delegated to this defendant by various Executive Orders of the President of the
61 United States, by Acts of Congress and by resolutions duly adopted by the United States Shipping Board. While acting as such public agent, during said period, this defendant received and disbursed for the account of the United States very large sums of money and acquired thereby and by expenditure of its own corporate funds as aforesaid, a great amount of real and personal property to which it held title, up to June 5, 1920, as an Agent and as a trustee for the United States.

19. On June 5, 1920, the Act of Congress designated by the statutory name, Merchant Marine Act, 1920, was approved by the President, (41 Statutes at Large, 988; U. S. C. Title 46, Sec. 861, et seq.). By section 4 of said Act all of the property and assets of whatsoever kind, acquired by this defendant as aforesaid, except such as in the opinion of the President of the United States were required for use by other branches of the service of the Government of the United States, were transferred to the United States Shipping Board, and this defendant thereby was divested, by operation of law, of any private corporate ownership in all money or property in its possession or under its control, including all property acquired for the use and account of the United States through expenditure of its own corporate funds, as hereinbefore stated.

20. On April 16, 1923, this defendant, by a formal deed duly signed, sealed and delivered by its President and Secretary thereunto duly authorized, and upon a valuable consideration, granted, bargained, sold, transferred, assigned and conveyed to the United States of America, its successors and assigns, all the goods, chattels, bonds, bond notes, shares of stock, contracts, securities, claims, personal property, and choses in action, including accounts against divers persons for the payment of money, and all personal property of
62 every kind and description whatsoever, wherever the same was situated, theretofore acquired by this defendant and not theretofore disposed of by it and then remaining under the disposition or control of this defendant. A true copy of said deed is hereto annexed, marked Exhibit "B" and by reference thereto incorporated herein. Upon the execution and delivery of said deed the defendant, by its voluntary act, divested itself of all title or color of title to any and all money and other personal property then in its possession or on deposit in any bank or banks, and thereafter and up to the time this suit was filed this defendant has not owned any personal property, including money, and has not possessed or controlled any money on deposit in any bank or banks except public funds appropriated by Congress and funds received by this defendant in the performance of its authorized activities as a public agent as hereinafter set forth and in which this defendant possessed no equitable or beneficial interest.

21. The Merchant Marine Act, 1920, conferred various powers and duties upon the United States Shipping Board with respect to the sale and operation of vessels owned by the United States and controlled by said Board and with respect to the liquidation of the property and other assets acquired for the account of the United States prior to June 5, 1920, and transferred to said Board as aforesaid. Section 12 of said Act continued the legal existence of the defendant corporation until all of the Government's merchant vessels, transferred to the Board, were sold in accordance with the provisions of said Act. Section 35 of said Act provided that, except as therein specifically provided, the power and authority vested in the United States Shipping Board might be exercised directly by the Board, "or by it through the United States Shipping Board Emergency Fleet Corporation." Pursuant to the authority so conferred, the United States Shipping Board, by suitable resolutions duly and legally adopted, subsequent to June 5, 1920, and from time to time, delegated certain of its powers with respect to the sale and operation of vessels, liquidation of the Government's property and assets and disbursement and collection of its public money, to this defendant, to be exercised and performed by this defendant as the Board's administrative agent. True copies of the resolutions adopted by the United States Shipping Board as aforesaid are hereto annexed, marked Exhibits "C," "C–1," "D," and "E," respectively, and made a part hereof.

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22. In the Sundry Civil Act, approved June 5, 1920 (Public 246, H. R. 13870), the same date the Merchant Marine Act, 1920, became effective, the Congress appropriated to the United States Shipping Board a large sum of money, including the unexpended balance on hand on July 1, 1920, which appropriation, inter alia, was for the following purposes.

"The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges, and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction."

Thereafter, and until the fiscal year ending June 30, 1933, the Congress has annually appropriated large sums of money to the United States Shipping Board for "the expenses" of this defendant and other purposes, and under the appropriations so made and under the authority delegated to this defendant by resolutions of the United States Shipping Board as aforesaid, this defendant's activities as an agent of said Board have been financed and this defendant has acquired possession of and has disbursed a large part of such public money so appropriated, but the acquirement and possession and disbursement of such appropriated public money has at all times been in defendant's capacity as a duly authorized agent of the United States and not in its capacity as a private corporation.

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23. At the time of the closing of the Commercial National Bank of Washington on February 27, 1933, the moneys on deposit in said Bank, amounting to $264,302.16, and credited on the books of said bank under the name, caption, and designation, "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account", as alleged in Paragraph 11 of the Bill of Complaint, were wholly

and exclusively composed of public moneys derived from proceeds of sale of Government vessels, revenues from the operation of Government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States, which had come into the possession of or under the control of this defendant in the course of its activities as a duly authorized agent of the United States, as hereinabove set forth in Paragraph 21 of this Answer.

The said deposit account had been opened on December 1, 1921, and thereafter had been continuously maintained in said Bank up to the time of the closing thereof, as aforesaid, pursuant to a resolution duly adopted on December 1, 1921, by the Board of Trustees of this defendant corporation, which resolution was as follows:

"Whereas, In the interests of the United States it is desirable to facilitate the negotiation of checks drawn on depositaries other than the Treasurer of the United States,

"Resolved, That the Treasurer of the United States Shipping Board Emergency Fleet Corporation be and he is hereby authorized to open an account with the Commercial National Bank of Washington, D. C., a constituent member of the Federal Reserve and a government depositary, in the name of the United States Ship-
65 ping Board Emergency Fleet Corporation, subject to the check of the Treasurer, this account being established for the purpose of depositing for immediate collection checks drawn in favor of the Emergency Fleet Corporation on depositaries other than the Treasurer of the United States; proceeds from said checks to be placed in said account to the credit of the Emergency Fleet Corporation in order that they may be available for immediate expenditure by the Emergency Fleet Corporation or transfer to the Treasury of the United States."

No disbursements from this deposit account were made by this defendant and no checks were drawn thereon except checks for adjustments with said bank and checks deposited with the Treasurer of the United States for the purpose of transferring funds from said account to the United States Treasury. Such transfers of funds from said account were made from time to time in round sums of $50,000 or $100,000 and the funds so transferred were immediately commingled in the United States Treasury with other public funds of the United States.

Section 14 of the Merchant Marine Act, 1920, requires that the net proceeds from the activities authorized by that Act, less such amount as might be authorized annually by Congress to be withheld as operating capital, and less amounts needed for the insurance and construction loan funds maintained by the United States Shipping Board, should be covered into the Treasury of the United States as miscellaneous receipts.

24. At and before the day and date defendant opened the said "Agent, Deposit Account", in said bank on December 1, 1921, as aforesaid, and continuously since that date, and up until the date of the filing of this Answer, this defendant has kept and maintained in the Treasury of the United States deposit-checking accounts in which this defendant from time to time deposited public
66 moneys controlled by this defendant in its capacity as an agent of the United States as aforesaid, which public moneys had come into this defendant's possession or under this defendant's con-

trol from governmental activities precisely similar to the transactions from which all the funds deposited by this defendant in said bank were derived, and upon information and belief all said funds so deposited were received and accepted by the Treasurer of the United States as public moneys of the United States, and were held and disbursed by the Treasurer of the United States upon order of this defendant supported by public vouchers duly executed.

25. At the time of the closing of the Commercial National Bank of Washington, on February 27, 1933, the funds on deposit in said Bank amounting to $144,995.12, and credited on the books of said Bank under the name, caption and designation, "United States Shipping Board Merchant Fleet Corporation, Agent, Good Faith Deposit Account", as alleged in Paragraph 11 of the Bill of Complaint, were wholly and exclusively derived from funds delivered to this defendant as security for performance of sales or purchase proposals submitted to this defendant as agent for the United States Shipping Board or other similar suspense items and for which the United States was accountable. This defendant had continuously kept and maintained said deposit account in said Bank since January 14, 1926. No disbursements were made from this "Good Faith Deposit Account" and no checks were drawn thereon except to unsuccessful bidders for return of their deposits or for deposit with the Treasurer of the United States when the bidder's deposit was forfeited or was credited on the transaction for which the deposit had been made. This defendant possessed no equitable or beneficial interest in any of the funds deposited in said account and was merely the trustee custodian of said funds, the United States being at all times
67 the real owner of all of said funds and of said bank credit.

From time to time, and when funds had accumulated in said "Good Faith Deposit Account" which had been credited on the purchase of ships, or other transactions, or forfeited to the United States, this defendant would transfer such accumulation of funds to the Treasury of the United States by checks drawn on said account and deposited with the Treasurer of the United States, who, upon information and belief, received and accepted such transfers of funds as public moneys of the United States.

26. Upon information and belief, from and after the times said two bank accounts were opened by this defendant as aforesaid, and during all the time said bank accounts were maintained and up to and including February 27, 1933, the officers and directors of said bank had notice and well knew that all the funds deposited in said two accounts were public funds, in which this defendant possessed no beneficial or private corporate interest, as appears from letter from said banks to this defendant's Treasurer, hereto attached, marked Exhibit "E 1" and made a part hereof and they well knew that the possession of and control by this defendant of said deposit accounts and the funds deposited therein was solely in its capacity as an agent of the United States.

27. On November 4, 1931, the United States Shipping Board, and on November 11, 1931, the Board of Trustees of this defendant, duly passed resolutions in the words, letters and figures following, to-wit:

"Whereas, monies of the United States have been deposited in divers banking institutions by the Merchant Fleet Corporation; and

"Whereas, it is provided under Title 12, Section 90, of the Compiled Statutes, that the Secretary of the Treasury shall require all

national banking institutions who are acting as financial agents of the Government to give satisfactory security by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them; and

"Whereas, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress;

68 "Resolved, that all banks and banking institutions which have or shall have monies of the United States in the name of the United States Shipping Board Merchant Fleet Corporation be and they are hereby required as a condition of the said deposit to give satisfactory security to said Merchant Fleet Corporation by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as depositaries of such monies.

"Further resolved, that the Treasurer of the United States Shipping Board Merchant Fleet Corporation be and he is hereby authorized and required to address to each one of the said banks and banking institutions now having such monies on deposit, a letter in the form hereto attached enclosing a form of deposit agreement, and as a condition for the continuance of said deposit the said Treasurer of the said Merchant Fleet Corporation is authorized and directed to require the signing of an agreement in the form attached hereto, and the deposit by such depositary of United States Bonds in adequate amounts as collateral for the repayment of the amount of each deposit in each bank and banking institution, respectively".

28. Upon information and belief, after the adoption of said resolutions by the United States Shipping Board and by this defendant, and prior to November 19, 1931, Albert H. Denton, who was then a Commissioner of the United States Shipping Board and Chairman of said Board's Committee on Finance, was expressly authorized by said United States Shipping Board to negotiate with said bank to obtain security therefrom for the deposits of moneys of the United States then being maintained in said bank by this defendant as aforesaid. Thereupon, and pursuant to said authority and acting for and upon behalf of the United States, the said Albert H. Denton negotiated with the officers of said bank and conferred with the Comptroller of the Currency concerning said deposits and the obtaining of security therefor. During the course of said negotiations said Denton notified the said bank and the officers thereof that

69 unless adequate collateral was pledged by said bank as security for said deposits of public funds the said accounts would be closed by the withdrawal of the balances therein.

As a result of said negotiations and with the approval of the Comptroller of the Currency, the said bank agreed to give security for the public moneys deposited with it by this defendant and the terms of said agreement were embodied in a written instrument duly executed by said bank on November 19, 1931 (Exhibit B-1 attached to the Bill of Complaint). On, to-wit, November 19, 1931, the Commercial National Bank of Washington, in execution of said written instrument, delivered to this defendant, and this defendant received and accepted, the certain promissory notes described in said agreement, to the aggregate principal amount of $1,858,377.68, secured by deeds of trust on certain real properties, and the same thereafter

continuously until they were surrendered and returned to the said bank as hereinafter alleged, were held by this defendant, as agent of the United States as aforesaid, as security for prompt payment by the bank, on demand, of any and all funds deposited or thereafter deposited in said bank to the credit of this defendant.

On December 9, 1931, the United States Shipping Board duly approved the said agreement and ratified the acceptance by this defendant, through its Treasurer, of the promissory notes therein described, upon the conditions therein stated.

29. On July 20, 1932, by a letter of that date, a true copy of which is hereto annexed, made part hereof and marked Exhibit "F", addressed to the Treasurer of this defendant, the said bank, among other things, requested to be advised whether a substitution
70 for the said promissory notes delivered as aforesaid by the said bank to this defendant of United States Government bonds or Treasury Notes as security for the said deposits would be acceptable to this defendant, and advised that the said bank was prepared to make such exchange at any time and would like to close such transaction without delay; and on the same day upon the written recommendation of that date, a true copy of which is hereto annexed, made part hereof and marked Exhibit "G", by the President of this defendant to the United States Shipping Board, the United States Shipping Board approved and authorized the proposed substitution of securities.

30. On August 2, 1932, the Board of Directors of the said bank adopted a resolution, a true copy of which is hereto annexed, made part hereof and marked Exhibit "H" hereto, authorizing the substitution for the said promissory notes delivered to this defendant as aforesaid of the bonds hereinafter described, and on the same day the said bank addressed a letter, a true copy of which is hereto annexed, made part hereof and market Exhibit "I", to the United States Shipping Board, wherein, among other things, were stated the conditions subject to which such substitution would be made; and on August 3, 1932, the said bank addressed and caused to be delivered to the Treasurer of this defendant a letter, a true copy of which is hereto annexed, made part hereof and market Exhibit "J", with which was enclosed a certified copy of the aforesaid resolution of the Board of Directors of said bank passed August 2, 1932, and also the aforementioned letter of August 2, 1932, addressed to the United States Shipping Board by the said bank.

71 31. On August 5, 1932, pursuant to and in conformity with the aforesaid action of the United States Shipping Board of July 20, 1932, and the aforesaid resolution of the Board of Directors of said bank of August 2, 1932, and subject to the conditions stated in the aforesaid letter of said bank to the United States Shipping Board, of August 2, 1932, this defendant surrendered to the said bank all of said promissory notes and at the same time received from said bank as security for said deposits bonds of the United States of the descriptions and in the forms set out below, to-wit:

$100,000 U. S. Treas	3¼%	Bonds of 6/15/46-49.
75,000 U. S. Treas	3⅜%	Bonds of 3/15/43.
25,000 U. S. Treas	3½%	Bonds of 3/15/46-50.
200,000 4th Liberty Loan	4¼%	Bonds of 10/15/33-38.

and thereafter continuously until the said suspension and closing of the bank and until the disposal of said bonds as hereinafter alleged,

for the satisfaction of the public moneys to the credit of this defendant in said bank at the time of said closing, this defendant held the said bonds as security as aforesaid.

32. At the time said instrument in writing was executed and delivered by said bank and said security was given by said bank as aforesaid on November 19, 1931, the balance of public moneys on deposit in said bank to the credit of this defendant in the account carried under the name, caption, and designation "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account" was the sum of $643,639.82. Thereafter, and up to the time of the closing of said bank on February 27, 1933, acting in reliance upon the security pledged by said bank as aforesaid, this defendant made
72 further large deposits of public funds in said bank which were credited by said bank to defendant in said Agent, Deposit Account, the total sum of such additional deposits being $1,970,656.79.

Also, on November 19, 1931, the balance of public moneys on deposit in said bank to the credit of this defendant in the account carried under the name, caption, and designation, "United States Shipping Board Merchant Fleet Corporation, Agent, Good Faith Deposit Account," was the sum of $64,681.25. Thereafter, and up to the time of the closing of said bank on February 27, 1933, acting in reliance upon the security pledged by said bank as aforesaid, the defendant made further large deposits of public funds in said bank which were credited by said bank to defendant in said Agent, Good Faith Deposit Account, the total sum of such additional deposits being $170,888.60. A tabulation showing by months the deposits of public moneys made by this defendant in said Bank from November 19, 1931, to February 27, 1933, inclusive, is hereto annexed, marked Exhibit "K" and made a part hereof.

33. This defendant has been informed and believes, and therefore avers the fact to be that at the time said agreement was made and said collateral was pledged and accepted as aforesaid, the said bank was solvent and then possessed other assets sufficient to satisfy all lawful demands of all other creditors of said bank. Upon information and belief, at the time said deposits of public moneys were being made by this defendant in said Bank as aforesaid and up to the time of the closing of said Bank as aforesaid, the Commissioners of the United States Shipping Board and the Trustees of this defendant corporation and the Treasurer thereof, were led to believe and did believe that said Bank was authorized to receive said deposits of public moneys and to pledge assets of said Bank as security therefor.

73 34. The said action of this defendant and of said bank in exacting and in giving security, respectively, for said two deposit accounts, upon information and belief, was known to and approved by the Department of the Treasury of the United States, and by the officers thereof charged with supervision of National Banks, including the Comptroller of the Currency, and by the exaction and giving of security for this defendant's two deposit accounts, and the approval thereof by the Treasury Department every provision of Section 90, Title 12, United States Code, was complied with within the intent of the statute, and the pledge of security for the deposits by the bank was in all respects valid and lawful and is binding upon

the plaintiff and upon all the stockholders and creditors of said bank.

35. Upon information and belief, said bank, at the time this defendant opened the said deposit account on, to-wit, December 1, 1921, was not then, and up to the time of the closing of said bank on February 27, 1933, did not become designated by the Secretary of the Treasury a depository of public moneys of the United States, except in the manner hereinbefore set forth and except as a limited depository with authority to accept not to exceed $5,000 of deposits made by United States Courts and their officers for credit to their official checking accounts, as set forth in a letter of January 26, 1923, from the Chief of the Division of Deposits of the Treasury Department addressed to James B. Reynolds, Vice-President of said bank, a copy of said letter being hereto attached, marked Exhibit "L," and made a part hereof.

36. The money, amounting to $281,695.31, collected by the Treasurer of the United States on the checks drawn by the Comptroller of the Currency as aforesaid, the money amounting to $125,160.94 credited to the Treasurer of the United States by the Federal Reserve Bank of New York City as aforesaid, the money amounting to $4,250.00 and the matured interest coupons amounting to $1,734.24, deposited by this defendant in the Treasury of the United States as aforesaid, amounting to a total of $413,140.49, then became commingled with other public money of the United States and so remained until the end of the fiscal year 1933, to-wit, until midnight, June 30, 1933, and at that time the only appropriation act under which said moneys might have been paid out or expended by this defendant, to-wit, "An Act making appropriations for the Executive office and sundry independent executive bureaus, boards, commissions, and offices, for the fiscal year ending June 30, 1933, and for other purposes," approved June 30, 1932 (47 Stat. 468), had ceased to be of any effect.

37. This defendant does not now possess or control any of the money claimed by plaintiff or any private corporate money or property on which a trust could be imposed by this Court as prayed by plaintiff. This defendant has no property or money of its own and does not possess, hold, or control any property or money, except public money appropriated by Congress to the former United States Shipping Board or to the Department of Commerce, which succeeded on August 10, 1933, to the powers and duties formerly vested in the United States Shipping Board, for certain specified and particular public purposes and objects. The purposes and objects for which said appropriations of public money were made do not include provision for payment of a judgment or decree against this defendant in actions of this nature, and this defendant could not lawfully pay or satisfy from any money now in its possession or under its control any decree for the payment of money that might be entered in this action.

In so far as the bill of complaint herein attempts or purports to state a cause of action in equity against this defendant and as defenses thereto, this defendant states:

(a) The Bill of Complaint is multifarious in that there is a misjoinder of several causes of actions and a misjoinder of parties defendant. The facts pleaded with respect to the alleged deposits and preferences to Inland Waterways Corporation bear no relation to and have no connection with the facts alleged concerning deposits

made by and preferences given to the other defendants. The facts alleged with respect to the deposits made by and supposed preferences given to this defendant bear no relation to the facts pleaded with respect to the other defendants. The same is true with respect to the causes of action alleged against the Secretary of War and the Attorney General. The circumstance that each one of the defendants is a government agent or agency does not present a common point of decision. The authority of each of said agents and the character of the money deposited by each, and the circumstances under which the deposits were made and the pledges taken, are dependent on different statutory provisions and upon different sets of facts. If this suit is not dismissed, this defendant is entitled to and prays the Court to order that this defendant shall have a separate trial by the Court.

(b) Plaintiff is not entitled to maintain this action against this defendant because, as appears upon the bill and this answer, only property rights, property interests, and public moneys of the United States are involved in the transactions between this defendant
76 and said bank and between this defendant and the plaintiff herein. This defendant's principal, the United States of America, is an indispensable party whose interests are and will be vitally affected by this suit and in whose absence the Court ought not to proceed, but the amount claimed is in excess of $10,000, and this Honorable Court does not possess jurisdiction to adjudicate the rights of the United States in the subject matter of this suit.

(c) Even if the deposits to the credit of this defendant in said bank at the time of the closing thereof were not lawfully secured by the pledged bonds, the payments plaintiff is now seeking to recover were voluntarily made by plaintiff with full knowledge of all the facts, the transaction is fully executed and upon all the facts the equities asserted by plaintiff are inferior to the equities of this defendant and of its principal, the United States.

(d) The moneys paid from the funds of said bank by order of the Comptroller of the Currency and the moneys received from the sale of the pledged bonds and from the matured interest coupons thereon, which constitute the trust res claimed by plaintiff, are not in the possession of nor under the control of this defendant, and have not been under the control of this defendant since June 30, 1933, at which time said moneys were commingled with other public moneys in the Treasury of the United States.

(e) The deposits of public moneys made by this defendant in the two accounts maintained in said bank and secured by the pledge of United States bonds as hereinabove set forth were in accordance with the true intent and meaning of Section 90, Title 12, United States Code, and the repayment to the United States of the balances
77 on deposit in said bank at the time of the closing thereof, together with interest accrued thereon, was in all respects valid and lawful. Equity regards substance rather than form and equity regards as done that which ought to be done.

(f) In the alternative, if said bank at the time it received the deposits of public moneys from this defendant as hereinabove set forth was not an authorized depositary of public moneys and particularly, if said bank had not been authorized as a public depositary of the public moneys controlled by this defendant as an agent of the United States, said bank and the officers and agents thereof knowingly

violated Section 96 of the Criminal Code of the United States (Sec. 182, Title 18, U. S. C.), and did then and there embezzle said public moneys. The said bank at the time of each such deposit became and was bailee and trustee of the moneys so deposited, for the use and benefit of the United States, and did not acquire title to any of the same, but the title of all thereof remained in the United States, and by accepting and receiving each of said deposits of money and commingling the same with other moneys, said bank did, by force of law, replace the same by charging the bonds and other property so, as aforesaid, by the said bank, delivered to and held by this defendant, with a trust as security for the repayment of the money and funds of the United States deposited by this defendant as aforesaid; and the bonds held by this defendant as aforesaid at the time of the suspension and closing of said bank remained and were at that time so charged; and thereafter, with the knowledge and participation of the plaintiff, in the execution of said trust, the said bonds were disposed of and the proceeds thereof were applied first to the satisfaction of
78 the sums in said accounts to the credit of this defendant, and the excess of such proceeds were paid to and received by the plaintiff.

(g) If plaintiff is entitled to recover from this defendant the payments described in the Bill of Complaint, plaintiff possesses a plain, adequate, and complete remedy at law.

Wherefore, having fully and completely answered the Bill of Complaint, this defendant prays that this action be dismissed as to this defendant, with judgment for its costs herein expended and such other equitable relief as the exigencies of the case may require.

LESLIE C. GARNETT,
United States Attorney.
H. L. UNDERWOOD,
Assistant United States Attorney.
O. P. M. BROWN,
Special Counsel,
United States Shipping Board
Merchant Fleet Corporation.
Attorneys for Defendant,
United States Shipping Board
Merchant Fleet Corporation.

F. R. CONWAY,
Of Counsel.

79 DISTRICT OF COLUMBIA, *ss:*

Charles D. Gibbons, being first duly sworn on his oath, deposes and says: that he is the Treasurer of the United States Shipping Board Merchant Fleet Corporation, the defendant in this action, and that he is authorized to make this affidavit for said defendant; that he has read the foregoing answer made by said defendant to the bill of complaint herein and knows the contents thereof; that the facts stated in said answer without qualification are within his knowledge and are true, and that the facts stated therein upon information and belief he believes to be true.

CHARLES D. GIBBONS.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 16th day of September, A. D. 1935.

[SEAL] E. W. ANDERSEN.

80 *Exhibit "A 1"*

MARCH 8, 1933.

COMPTROLLER OF THE CURRENCY,
Treasury Department, Washington, D. C.

SIR: On the occasion of a recent visit to your office, Mr. Heber M. Wells, Treasurer of the United States Shipping Board Merchant Fleet Corporation, was referred to the Division of Insolvent National Banks for information concerning the deposit carried by the Merchant Fleet Corporation in the Commercial National Bank in Washington, D. C.

It was suggested that a letter be forwarded to you concerning this deposit, in order that there could be a mutual understanding of the facts, and that the proper steps to protect the government ests might be expeditiously determined.

This account has been maintained in the Commercial National Bank for a long period of years and includes the proceeds of numerous checks deposited therein and collections of notes placed with the bank for collection and credit to the account. In November 1931, pursuant to directions of the Shipping Board, the Commercial National Bank was required to furnish collateral security for the deposit. The security originally furnished was subsequently replaced by the following, which are presently held in custody of the Treasurer of the Merchant Fleet Corporation.

$200,000	U. S. Fourth Liberty Loan 4¼%		1933–38
100,000	U. S. Treasury Bonds 3½%		1948–49
75,000	U. S. " "	3⅜%	1941–43
25,000	U. S. " "	3¾%	1946–56

When the Commercial National Bank closed, on February 28, 1933, the amount on deposit in this account was $409,008.67, which exceeds the present market value of the collateral security by approximately $15,300.00.

For your information, there is attached hereto, copy of letter dated August 2, 1932, which sets forth the agreement with the Commercial National Bank concerning the collateral now held as security for this account.

From the discussion had with representatives of the Division of Insolvent National Banks, the rights of the Merchant Fleet Corporation as a secured depositor were definitely determined, provided there could be no doubt that the money on deposit consisted of public funds. As to this point; your attention is invited to the terms of the Independent Offices Appropriation Act, for the fiscal year 1933 and/or for preceding years, from which it will be observed that all funds of the Merchant Fleet Corporation are appropriated to the Shipping Board each year, being designated in the Appropriation Act under the heading "United States Shipping Board Shipping Fund." Several specific appropriations are made under this heading, including the following:

81 (a) The amount of operating funds on hand at the beginning of the fiscal year, not to exceed $50,000,000.

(b) An amount appropriated from funds in the United States Treasury.

(c) All amounts received during the fiscal year, except sales receipts.

(d) Authorization to use a certain portion of sales receipts to meet the expenses of liquidation.

(e) Interest earned on funds of the Corporation in banks.

Checks or notes deposited in the Commercial National Bank consist either of operating receipts, as covered by subparagraph (c) quoted above, or of collections of principal or interest on ship sales or other notes, which in all cases represent amounts due the Shipping Board from the sale of vessels or other assets. In this latter connection, it is pertinent to note that all vessels and other assets are held in the name of the Shipping Board, as provided by Section 4 of the Merchant Marine Act of 1920, and there can be no doubt that the Shipping Board is a government agency. All sales agreements covering vessels or other assets are executed in the name of the United States of America, by United States Shipping Board, acting by and through its agent, the United States Shipping Board Merchant Fleet Corporation.

While a portion of sales receipts are available to meet liquidation expenses each year, as provided in sub-paragraph (a) of the annual appropriation acts, as mentioned above, it should also be noted that Sections 10 and 11 of the Merchant Marine Act, 1930 (U. S. C., Title 46, Sec. 809) as amended by Sections 501 and 501, respectively, of the Merchant Marine Act of May 22, 1928, provide that sales receipts may be deposited in the Insurance Fund and in the Construction Loan Fund authorized to be maintained by the Shipping Board. All sales receipts, including those temporarily deposited in the Commercial National Bank, are ultimately used for one of these three purposes.

For these reasons, it is believed that there is no doubt but that the funds deposited in the Commercial National Bank, consisting either of operating receipts of the Merchant Fleet Corporation or sales receipts, as well as other funds of the Corporation, whether they be deposited in the United States Treasury or in banks, being all in the nature of appropriated funds, are public moneys.

Confirmation of this opinion is contained in a letter addressed to the United States Shipping Board by the Comptroller General of the United States under date of June 16, 1931. Photostat of this letter is attached hereto, from which the following should be noted:

82 "The vessels and other property in custody of the Board constitute property of the United States, controlled through its agent, the Merchant Fleet Corporation, and moneys derived from the business operations of the Fleet Corporation are moneys of and for the use of the United States * * *"

On March 15, 1933, interest will be due on U. S. Treasury 3⅜ and 3¾ bonds. The interest on bonds of these issues held by the Merchant Fleet Corporation as security for the account in the Commercial National Bank, together with accrued interest on the other securities similarly held will amount to approximately $6,000 on March 15, 1933.

It is requested that the Merchant Fleet Corporation be advised whether or not, in your opinion, it may dispose of the above mentioned collateral at such time as it considers appropriate, and whether as the interest coupons mature, or when the securities are sold, in-

terest payments may be applied as an offset to the deposit, in the same manner as the amount recovered on the securities themselves.

Assuming your answer to these inquiries to be in the affirmative, will you please also confirm our understanding that when our claim is filed with the Receiver of the Bank, the amount claimed will be the total amount on deposit at the time of closing, plus interest due thereon at the rate of 1% per annum computed on daily balances, without regard for amounts that may be realized from the disposition of the collateral security.

Another point on which your advice is desired concerns the last sentence in the second paragraph of the Commercial National Bank's letter of August 2, 1932, which reads as follows:

"In case of depreciation in the market value of said securities herewith pledged, additional securities shall be added as required by you."

In view of this statement, is the Receiver for the Bank in a position to furnish additional collateral if and when requested to do so by the Merchant Fleet Corporation to cover the difference between $400,000 and the present market value of the securities, which is approximately $393,735?"

Very truly yours,

(Signed) ELMER E. CROWLEY, *President.*

CDG:RD.

83 *Exhibit "A 2"*

JFA:eb.

MARCH 17, 1933.

Mr. ROBERT C. BALDWIN,
Receiver, Commercial National Bank,
Washington, D. C.

DEAR SIR: Receipt is acknowledged of your letters of March 7th and March 8th referring to the deposit balance of the United States Shipping Board, Merchant Fleet Corporation, Agent Deposit Account $264,125.05, and United States Shipping Board, Merchant Fleet Corporation, Agent Good Faith Deposit Account $144,883.62. There is attached for your information a copy of a letter dated March 8th sent the Comptroller of the Currency in this connection by Mr. Elmer E. Crowley, president of the Merchant Fleet Corporation. The enclosures to this letter are retained for our files but they are available for your examination at any time.

It appears that under date of November 19, 1931 these balances were secured by mortgage notes in the face amount of $1,158,377.08, pledged with the Federal Reserve Bank of Richmond as trustee. On August 3, 1932 United States Government obligations in the face amount of $400,000 were substituted for the mortgage notes pursuant to a resolution of the Board of Directors of your bank. You advise that there has been no change in the collateral since August 3rd, 1932, hence the possibility of any violation of Section 5242 U. S. R. S. seems to be eliminated.

National banking associations are without power to pledge assets to secure private deposits hence if the deposits in question can be classified as private funds it would be your duty as Receiver to move to recover the collateral in the Supreme Court of the District of

Columbia. Baltimore & Ohio Railroad v. Smith, 56 Fed. (2nd) 799; Texas & Pacific Railroad v. Pottorff, United States Circuit Court of Appeals, decided January 19, 1933. It seems clear that these deposits are not "deposits of public money by the United States" within the meaning of certain Federal statutes. However there are a line of authorities to the effect that public money consists of all money in the hands of a public officer in his public capacity without reference to the source or ultimate disposition.

Kiechofer v. United States, 19 App. D. C. 405
In Re Reiner, 122 Fed. 109
State v. McGraw, 240 Pac. 812
People v. Hamilton, 32 Pac. 526
Agoure v. Peck, 121 Pac. 706
Myers v. Board of Comm., 56 Pac. 11
Spratley v. Board, 43 Pac. 232
People v. Backus, 22 N. E. 759
People v. McGrath, 279 Ill. 550.

84 In view of these authorities and the Federal decisions fixing the status of the Merchant Fleet Corporation we are satisfied that the prospects of successfully attacking the pledge of assets for these funds would not warrant the expenditure necessary. Accordingly, you are authorized to advise the Merchant Fleet Corporation that you as Receiver will interpose no objection to the sale of the securities in the face amount of $400,000, through a recognized broker, the proceeds to be applied in payment of the deposit claims.

As you know a secured creditor of an insolvent National bank may prove and receive dividends upon the face of its claim as it stood at suspension without crediting the collateral or the collections therefor, subject to the proviso that dividends must cease when, from them and the collateral proceeds, the claim is paid as of suspension. Aldrich v. Chemical National Bank, 176 U. S. 618; Merrill v. National Bank, 173 U. S. 131; American Surety Co. v. DeCarle, 25 Fed. (2nd) 18. It follows that you should recognize the general claims of the Merchant Fleet Corporation for these deposit balances, with any interest due computed as of suspension and that the corporation should be paid in dividends, the deficiency between the net amount obtained from the collateral and the deposit claims computed as of suspension. Of course you as Receiver are without authority to furnish any additional collateral to the Merchant Fleet Corporation to secure the deficiency, as all of the assets of your trust, unpledged at suspension, are owned by your trust's general creditors.

Yours very truly,

(Signed) GIBBS LYONS, *Deputy Comptroller.*

85 *Exhibit "A 3"*

COMPTROLLER OF THE CURRENCY,
TREASURY DEPARTMENT,
Washington, March 17, 1933.

Mr. ELMER E. CROWLEY, *President,*
Merchant Fleet Corporation, Washington, D. C.

DEAR SIR: The adjustment of the deposit balances of the Merchant Fleet Corporation in the Commercial National Bank of Washington,

D. C. at suspension, discussed in your letter of March 8, 1933, will be made by Mr. Robert C. Baldwin, Receiver. There is attached hereto for your information a copy of a letter sent Mr. Baldwin today that should effect an adjustment in so far as the collateral proceeds are concerned. Mr. Baldwin will issue Receiver's certificates to the Merchant Fleet Corporation for the balances as of suspension and will pay dividends thereon, when paid general creditors, until the deficiency is paid in full.

Yours very truly,

(Signed) GIBBS LYONS, *Deputy Comptroller.*

Enclosure.

86 *Exhibit "A 4"*

APRIL 4, 1933.

The Honorable SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: The United States Shipping Board Merchant Fleet Corporation holds as security for its account in the Commercial National Bank, the following Government obligations:

		Next interest coupons due
U. S. Liberty Bonds 4¼%	$200,000	4/15/33
" Treasury " 3½%	100,000	6/15/33
" " " 3⅜%	75,000	9/15/33
" " " 3¾%	25,000	9/15/33
Total	$400,000	

We have been advised by the Receiver of the Commercial National Bank that he will interpose no objection to the sale of these securities, the proceeds to be applied in payment of our deposit claims.

It is understood that the United States Treasury has facilities for disposing of the securities which are held as collateral for deposits of public funds, and it is requested, therefore, that you arrange for the disposition of the above mentioned bonds, the proceeds thereof, including accrued interest, to be credited to the United States Treasury account of Heber M. Wells, Treasurer, United States Shipping Board Merchant Fleet Corporation, symbol 93500. The Bonds in question have been delivered to the Division of Securities of the Office of the Treasurer of the United States, for safekeeping until liquidation, as requested herein, has been arranged.

It is requested that when this transaction has been completed, a report of the results thereof be forwarded to Heber M. Wells, Treasurer, United States Shipping Board Merchant Fleet Corporation, in order that he may file the required report with the Receiver of the Commercial National Bank, Washington, D. C.

Respectfully,

(Signed) H. I. Cone.
H. I. CONE, *Chairman.*

CDG:RD.

87 *Exhibit "A 5"*

COMMERCIAL NATIONAL BANK,
Washington, D. C., April 7, 1933.

Admiral HUTCHINSON I. CONE, *Chairman,*
United States Shipping Board Merchant Fleet Corporation,
Washington, D. C.

DEAR SIR: This has to do with the satisfaction of your account in The Commercial National Bank of Washington standing at $409,297.28 at suspension including accrued interest to that date.

To secure the above indebtedness you hold the following bonds:

Par value	Description	Today's prices	Value
$100,000	U. S. Treas. 3½% Bonds of 6/15/46-49	97 30/32	$97,937.50
75,000	U. S. Treas. 3 ¾% Bonds of 3/15/43	100 20/32	75,625.00
25,000	U. S. Treas. 3 ¾% Bonds of 3/15/46-56	102 16/32	25,675.00
200,000	4th Liberty Loan 4 ¼% Bonds of 10/15/33-38	101 27/32	203,687.57
			$402,925.07

You will see from the above total that your security shows $6,372.21 shortage to satisfy my deposit liability to you, and it will be necessary for you to file a general claim and obtain dividends to finally satisfy this deficiency.

The purpose of this letter is to get your approval of the redemption of $200,000.00 Fourth 4¼% Liberty Loan Bonds as above set forth by substituting $200,000.00 cash. This will create a somewhat additional deficiency due to the difference between par and the market price today of 101 27/32, and since this deficiency in either event would be taken care of by the first dividend paid by the Receiver on the claim, which you would necessarily have to file in either event, and since the $200,000.00 par value Fourth 4¼% Liberty Loan Bonds were borrowed from another institution and must be returned either through arrangements with you or buying them on the open market, it will be much simpler for the transaction to be handled this way and result in quite a saving to my trust.

The above situation has been taken up by the Comptroller of the Currency and the plan has his approval as well as that of the Receiver, and it is respectfully requested that your concurrence be lent in this matter. Inasmuch as this required quick attention, it is requested that you get the Receiver on the telephone as soon as you arrive at a conclusion, National 2680, and confirm the arrangements made then by letter.

Very truly yours,

(Sgd.) ROBT. C. BALDWIN, *Receiver.*

RCB/al.

88 *Exhibit "A 6"*

THE COMMERCIAL NATIONAL BANK,
Washington, D. C., April 7, 1933.

Admiral HUTCHINSON I. CONE, *Chairman,*
United States Shipping Board Merchant Fleet Corporation,
Washington, D. C.

DEAR SIR: Supplementing my letter of April 7th with respect to your deposit at suspension in various accounts at The Commercial

National Bank of Washington, I would like to also involve the second item in the list of bonds, viz:

$75,000.00 U. S. Treasury 3⅜% Bonds at 3/15/43

These also I should like to redeem in $75,000.00 cash along the lines set forth in my letter of April 7th.

Consequently, I should esteem your considering the foregoing in connection with my letter of April 7th.

Very truly yours,

(Sgd.) ROBT. C. BALDWIN, *Receiver.*

RCB/al.

89 *Exhibit "A 7"*

APRIL 8, 1933.

DEAR DR. BURGESS: I enclose with this, for your information, copy of a letter of April 4, 1933, from the Chairman of the United States Shipping Board, requesting the sale for their account of the following bonds:

Four Liberty 4¼'s	$200,000
Treasury 3⅛'s 1946–49	100,000
Treasury 3⅜'s 1941–43	75,000
Treasury 3¾'s 1946–56	25,000
Total	400,000

Since receipt of such request, the Board has telephoned requesting that the sale of $200,000 Fourth 4¼'s and of $75,000 Treasury 3⅜'s of 1941–43 be postponed until further advised. Accordingly, the Treasurer of the United States, who holds the bonds in safekeeping, is being instructed to cancel and deliver to the Register of the Treasury, for credit to the denominational exchange account of your bank, $100,000 Treasury 3⅛'s of 1946–49 and $25,000 Treasury 3¾'s of 1946–56.

When such delivery has been made, your bank will be advised, and you are thereupon authorized and directed to withdraw like face amounts of such Treasury bonds, as above-listed, from your denominational exchange stocks, and arrange for their sale on the market. You will please credit the Treasurer of the United States with the net proceeds of such sale for account of Heber M. Wells, Treasurer, United States Shipping Board Merchant Fleet Corporation, symbol 93500, issuing C/D therefor and transmitting duplicate copy thereof to the Commissioner of Accounts and Deposits, Treasury Department. As sales are made and amounts credited, kindly send statement thereof to my office for transmission to the United States Shipping Board.

Further advice will be given regarding the sale of Fourth 4¼'s and Treasury 3⅜'s of 1941–43, if later to be arranged.

Please acknowledge receipt.

Very truly yours,

(Signed) A. A. BALLANTINE,
Under Secretary of the Treasury.

DR. W. RANDOLPH BURGESS,
Deputy Governor, Federal Reserve Bank,
New York, N. Y.

Enclosure.
WSB:BOH.

90 *Exhibit "A 8"*

APRIL 12, 1933.

Honorable A. A. BALLANTINE,
Under Secretary of the Treasury, Washington, D. C.

SIR: With reference to my previous letters of April 4th and April 10th and your letter of April 8th, please be advised that the Shipping Board on April 11, 1933, authorized the sale of the following bonds to the Receiver of the Commercial National Bank, Washington, D. C., in exchange for cash in the amount of their face value:

Fourth 4¼% Liberty Loan Bonds with April 15, 1933 and subsequent coupons attached	$200,000
United States Treasury 3⅜% Bonds 1941–43, with September 15, 1933 and subsequent coupons attached	75,000

In accordance with arrangements that have been made with the Receiver of the Commercial National Bank, Washington, D. C., it is requested that this transaction be handled in the following manner:

Checks drawn by the Comptroller of the Currency on the Riggs National Bank, Washington, D. C., in the amounts of $200,000 and $75,000, respectively, will be deposited to the credit of the Treasurer of the United States Shipping Board Merchant Fleet Corporation, symbol 93500.

When collection on these checks has been completed, you are requested to notify the Treasurer of the Merchant Fleet Corporation accordingly, and you are authorized to forward the bonds for which payment has been made, to the Federal Reserve Bank, New York City, to be held by them in safekeeping for and subject to the order of Robert C. Baldwin, Receiver, Commercial National Bank, Washington, D. C., the safekeeping receipts to be delivered to him.

The transactions in regard to the two separate issues of bonds will probably be handled at different times but it is desired that the procedure be identical in each case.

Respectfully,

(Signed) H. I. Cone,
H. I. CONE, *Chairman.*

CDG: RD.

91 *Exhibit "A 9"*

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, April 14, 1933.

A-44013. 153217.
Chairman UNITED STATES SHIPPING BOARD,
Washington, D. C.

SIR: The attention of this office has been invited to the action taken by the Shipping Board at a meeting held April 11, 1933, authorizing the sale *at par* to the Receiver of the Commercial National Bank of certain United States Bonds which were held by the Shipping Board for the Merchant Fleet Corporation as collateral security for deposits made in the bank by the Corporation. It appears that upon the closing of the Commercial National Bank the Merchant Fleet Corporation had on deposit with the bank $409,297.28, secured by Government bonds in the amount of $400,000. Thus there was $9,297.28 on deposit in excess of the face value of the bonds.

It appears the bonds were so furnished the Government pursuant to an agreement as evidenced by a certain letter of August 2, 1932, by the Commercial National Bank to the Fleet Corporation, in which it was stated:

"Now, therefore, as collateral security for the repayment of any or all of said funds now or hereafter deposited in said open account and for the payment of interest thereon, the undersigned has this day delivered to you the following securities:

$200,000.	U. S. Fourth 4¼s, 1933–38.
100,000.	U. S. Treasury 3⅛s, 6/146–49.
75,000.	U. S. Treasury 3⅜s, 3/15/41–43.
25,000.	U. S. Treasury 3¾s, 3/15/56.
$400,000.	

92 which securities, or any substitutes therefor, or any additions thereto, either the whole or any part thereof, the undersigned hereby authorized and empowered the United States Shipping Board Merchant Fleet Corporation, or its Treasurer, or other person authorized by resolution of the said United States Shipping Board Merchant Fleet Corporation, on the non-payment of any of said funds, to sell, at public or private sale, at any time without advertisement or notice to the undersigned, and at the option of the said United States Shipping Board Merchant Fleet Corporation, or its Treasurer, or other person authorized by resolution of the United States Shipping Board Merchant Fleet Corporation, and upon said sale the United States Shipping Board Merchant Fleet Corporation may purchase all or any part of said securities, freed and discharged of any equity of redemption. After deducting all proper costs and expenses, the residue of the proceeds of sale shall be applied to the payment of the amount due on said deposits, both principal and interest, returning the over-plus, if any, to the undersigned, and should a deficiency occur, the undersigned further promises and agrees to pay the same on demand.' In case of depreciation in the market value of said securities herewith pledged, additional securities shall be added as required by you.

"Of course, it is understood that so long as we are not in default, you shall clip from the bonds hereto attached interest coupons as they mature and deliver the same to us for collection, but if we are in default you are authorized to retain such coupons and collect the interest due thereon and apply the same as hereinbefore provided."

The Fourth 4¼ per cent Liberty Bonds and the United States Treasury 3⅜ per cent bonds, 1941–43, authorized to be sold at par, have a market price as of April 13, 1933, of approximately $102^{18}/_{32}$ and $101^{2}/_{32}$, respectively.

By now permitting the sale of the bonds at par, not only would there be a relinquishing of securities for less than their current value but certain contract rights obtained under the agreement with the Commercial National Bank dated August 2, 1932, providing for adequate protection and the right in the Merchant Fleet Corporation to sell the bonds and/or take accrued interest thereon in the event of the defalcation by the bank, would be surrendered. The rule is that the rights of the United States may not be surrendered in the absence

of statutory authority or adequate valuable consideration therefor, and it does not appear that such authority or consideration is present in the instant matter.

Accordingly it is requested that the Board give further consideration to the matter and this office be advised thereof.

Respectfully.

(Signed) J. R. McCARL,
Comptroller General of the United States.

93 *Exhibit "A 10"*

APRIL 18, 1933.

Honorable A. A. BALLENTINE,
Under Secretary of the Treasury, Washington, D. C.

SIR: This will confirm our verbal request to the Division of Accounts and Deposits, United States Treasury Department, on April 15, 1933, for the withholding of delivery of securities to the Receiver of the Commercial National Bank, Washington, D. C., as provided in my letter of April 12, 1933.

To meet an objection that has been raised by the Comptroller General of the United States to the proposed arrangement, the Receiver of the Commercial National Bank and representatives of the United States Shipping Board and the Comptroller of the Currency, have now arranged that the following bonds will be sold to the Receiver of the Commercial National Bank of Washington, for $281,695.31:

Fourth 4¼% Liberty Loan Bonds with October 15, 1933, and subsequent coupons attached	$200,000
U. S. Treasury 3⅜% Bonds with September 15, 1933, and subsequent coupons attached	75,000

Checks drawn by the Comptroller of the Currency on the Riggs National Bank of Washington, D. C., in the total amount of $281,695.31, have been delivered to the United States Shipping Board Merchant Fleet Corporation and have been deposited in the United States Treasury to the credit of symbol 93500, Heber M. Wells, Treasurer, United States Shipping Board Merchant Fleet Corporation, on certificates of deposit #11609 and #11625, in the amounts of $75,000 and $206,695.31, respectively.

Interest coupons on the Fourth Liberty Loan Bonds due April 15, 1933, have been detached and converted into cash by the Merchant Fleet Corporation, pursuant to the new agreement with the Receiver.

In view of the new arrangement, you are requested to ignore our previous request outlining the method of handling the disposition of the Fourth Liberty Loan Bonds and the Treasury 3⅜% Bonds and when collection of the checks totaling $281,695.31, covered by certificates of deposit numbers 11609 and 11625, has been completed, you are requested and authorized to forward the above listed Bonds to the Federal Reserve Bank, New York City, to be held by them in safekeeping for and subject to the order of the Comptroller of the Currency, for the benefit of depositors of the Commercial National Bank of Washington, Insolvent.

94 In my letter of April 4, 1933, acknowledged by yours of April 8, 1933, you were requested to arrange for the sale of United States Treasury 3⅛% Bonds, with a face value of $100,000, and United States Treasury 3¾% Bonds, with a face value of $25,000

We now desire to renew our request that these two issues be disposed of in accordance with original plans.

We regret the inconvenience that has been caused by the several changes which it has been necessary to make in the arrangements for the disposition of these securities, and trust that the procedure as now revised may be followed without further modification.

With thanks for your cooperation in this matter,

Respectfully,

(Signed) H. I. Cone,
H. I. Cone, *Chairman.*

CDG:RD.

[Copy]

Exhibit "A 11"

April 21, 1933.

Dr. W. Randolph Burgess,
Deputy Governor, Federal Reserve Bank, New York City.

Dear Mr. Burgess: The Treasurer of the United States is holding subject to the order of the United States Shipping Board the following securities:

$200,000 face amount of Fourth Liberty loan 4¼% Bonds, with October 15, 1933, and subsequent coupons attached.

75,000 face amount of 3⅜% Treasury Bonds of 1941-43, with September 15, 1933, and subsequent coupons attached.

In accordance with request in letter dated April 18, 1933, from the Chairman of the United States Shipping Board to the Secretary of the Treasury, the Treasurer of the United States has been instructed to cancel these bonds and deliver them to the Register of the Treasury, for credit to the denominational exchange account of your bank. Copy of the above mentioned letter enclosed herewith.

The Commissioner of the Public Debt will in due course authorize you to make delivery from denominational exchange account in accordance with usual procedure. When delivery has been made, your bank is requested to hold the bonds in safekeeping subject to the order of the Comptroller of the Currency, for the benefit of depositors of the Commercial National Bank of Washington, Insolvent. Safekeeping receipts should be transmitted to this office with letter of advice for attention of the Commissioner of Accounts and Deposits.

By direction of the Secretary.

Respectfully,

(Signed) James H. Douglas,
Assistant Secretary of the Treasury.

Enclosure.
O'D.SIM.
April 20, 1933.

96 *Exhibit "A 12"*

FEDERAL RESERVE BANK OF NEW YORK,
April 12, 1933.

DEAR MR. BALLANTINE: In accordance with instructions contained in your letter of April 8, 1933, we sold on April 11, for delivery today:

$100,000. par value United States 3⅛% Treasury Bonds of 1946-49, at 98 18/32 net	$98,562.50	
	1,015.63	
		$99,578.13
25,000. par value United States 3¼% Treasury Bonds of 1946-56, at 103 8/32 net	$25,612.50	
Accrued Interest	70.31	
		25,882.81

which amounts we have today credited to the Treasurer of the United States for account of Heber M. Wells, Treasurer, United States Shipping Board Merchant Fleet Corporation under symbol 93500.

We attach duplicate copies of Certificate of Deposit Form No. 6599 in support of these transactions, showing the principal and accrued interest separately.

Very truly yours,

W. B. MATTESON,
Assistant Deputy Governor.

Honorable A. A. BALLANTINE,
Under Secretary of the Treasury, Washington, D. C.

Enclosures (4).

97 *Exhibit "A 13"*

Tabulation prepared by Treasurer of United States Shipping Board Merchant Fleet Corporation showing disposition of proceeds of liquidation of bonds pledged as security by Commercial National Bank of Washington, D. C.:

Securities sold to Receiver, Commercial National Bank			$281,695.31
Securities sold by Federal Reserve Bank—New York			125,460.94
Interest Coupons:			
Deposited in U. S. Treasury		$1,734.24	
Cashed and deposited in U. S. Treasury		4,250.00	
			5,984.24
Total Proceeds of Liquidation			$413,140.49
Application of Proceeds:			
Good Faith Deposit Account:			
Balance February 27, 1933		$144,883.62	
Interest to Feb. 27, 1933		111.50	
" Feb. 28, 1933, to April 17, 1933		174.90	
Deposit Account:			
Balance February 27, 1933	$264,125.05		
Less adjustment March 29, 1933	943.54		
		263,181.51	
Interest to February 27, 1933		177.11	
" Feb. 28, 1933, to April 17, 1933		341.68	
Total			$408,870.32
Amount paid to Receiver, Commercial National Bank, April 27, 1933			$4,270.17

98 *Exhibit "B"*

Special Contract #8163

This indenture made the 16th day of April, 1923, between the United States Shipping Board Emergency Fleet Corporation, a corporation organized and existing under the laws of the District of Columbia, party of the first part, and the United States of America, party of the second part, witnesseth:

Whereas, by virtue of the Emergency Shipping Fund provisions of the Appropriation Act of Congress, approved June 15, 1917, the President of the United States was authorized and empowered to engage in the construction and operation of ships and shipping as more fully set forth in said Act, and the President was further authorized by said Act of Congress and other subsequent Acts of Congress to utilize the appropriations made by the said Congress from that time down to the present time for the purpose of carrying out the Emergency Shipping Fund provisions of the said Appropriation Act of June 15, 1917, and its supplements and amendments, and

Whereas, pursuant to the said Act of June 15, 1917, and its supplements and amendments, the powers of the President were duly delegated to the United States Shipping Board and/or United States Shipping Board Emergency Fleet Corporation and the said last two mentioned bodies, pursuant to the powers in them vested by the said Act of Congress and in pursuance of the said duty of carrying on the construction and operation of ships and shipping used the moneys of the United States so appropriated in the purchase of goods, chattels, bonds secured by mortgage, bonds, notes, shares of stock, securities, contracts, personal property, claims and choses in action, including accounts against divers persons for the payment of money and all personal property of every kind and description whatsoever, and

99 Whereas, the legal title to the said property above mentioned was taken and now stands in the name of the United States Shipping Board Emergency Fleet Corporation, party of the first part, but the said party of the first part has no beneficial ownership therein, but, on the contrary, the beneficial ownership in the same is, and always has been, in the United States of America since the same was so acquired by the party of the first part, and

Whereas, the United States Shipping Board, pursuant to the powers and duties under the said Acts hereinbefore referred to, has ordered and directed that the legal title to all of the said property should be conveyed and become vested in the United States of America, party of the second part, to whom the same really belongs, and the United States Shipping Board Emergency Fleet Corporation, acting in its own capacity and also by express direction of said United States Shipping Board, desires by this deed to carry out the directions of the said Act of Congress and the said direction of the United States Shipping Board.

Now, therefore, the party of the first part, in consideration of the premises and of the sum of One Dollar ($1.00), lawful money of the United States, paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, has granted, bargained, sold, transferred, assigned and conveyed and by these

presents does grant, bargain, sell, transfer, assign and convey unto the party of the second part, its successors and assigns forever all the goods, chattels, bonds secured by mortgage, bonds, notes, shares of stock, contracts, securities, claims, personal property and choses in action, including accounts against divers persons for the payment of money and all personal property of every kind and description whatsoever, wherever the same may be situated, heretofore acquired by the party of the first part, and not heretofore disposed of by it, and now remaining under the disposition or control of the party of the first part.

To have and to hold the property hereinabove conveyed to the party of the second part, its successors and assigns forever. And the said party of the first part, its successors and assigns, do covenant and agree to and with the party of the second part, and its assigns, that it will, whenever requested so to do, make and execute any and all such further deeds of conveyance and other documents as may be required by the party of the second part and its assigns for the further assurance to the party of the second part and its assigns of the title to any and all of the said property hereinabove referred to.

In witness whereof, the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officers the day and year first above written.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION.

[SEAL] By J. B. SMULL, *President.*

Attest:

CLIFFORD W. SMITH, *Secretary.*

DISTRICT OF COLUMBIA, *ss:*

On this 18th day of April, 1923, before me came J. B. Smull to me known, who, being by me duly sworn did depose and say that he resides in District of Columbia; that he is the President of the United States Shipping Board Emergency Fleet Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; and that he signed his name thereto by like order.

[SEAL] CARL P. KREMER. *Notary Public,*
District of Columbia, United States of America.

My Commission expires Aug. 23, 1927.

No. 32887.

DISTRICT OF COLUMBIA, *ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, the same being a Court of Record, having by law a seal, do hereby certify that Carl P. Kremer before whom the annexed instrument in writing was executed, and whose name is subscribed thereto, was at the time of signing the same a Notary Public in and for said District, residing therein, duly commissioned and sworn, and authorized by the laws of said District to take the acknowledgment and proof of deeds or conveyances of lands, tenements, or hereditaments, and other instruments in writing, to be recorded in said District, and to administer oaths; and that I am

well acquainted with the handwriting of said Notary Public and verily believe that the signature to said instrument and impression of seal thereon are genuine.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Washington, D. C., the 19th day of April, A. D. 1928.

MORGAN H. BEACH, *Clerk.*
By CHAS. B. COFLIN, *Assistant Clerk.*

Proofed with the Original Duplicating Section.
MW/BC.

101 *Exhibit "C"*

United States Shipping Board, Washington

RESOLUTION ADOPTED BY THE UNITED STATES SHIPPING BOARD SEPTEMBER 30, 1921

Whereas, The Merchant Marine Act, 1920, provides that the power and authority thereby vested in the United States Shipping Board may be exercised either directly by the Board, or by it through the United States Shipping Board Emergency Fleet Corporation, except as therein otherwise specifically provided, and

Whereas, In the opinion of the Shipping Board, the executive and personnel organization of the Emergency Fleet Corporation has been completed to such a standard of efficiency as to make it desirable that the United States Shipping Board should exercise through the United States Shipping Board Emergency Fleet Corporation various administrative powers and functions, thus making it possible for the United States Shipping Board to devote its attention to study and determination of the broad and constructive questions of policy relating to the maintenance, development and encouragement of the American Merchant Marine, under the powers and duties imposed upon the United States Shipping Board by law,

Therefore, be it resolved, That it is the sense of the United States Shipping Board that its Chairman should retire as President, and that its members should retire as Trustees of the said United States Shipping Board Emergency Fleet Corporation, and that there should forthwith be elected a separate President and a separate Board of Trustees for the said United States Shipping Board Emergency Fleet Corporation; and

Be it further resolved, That the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall, until otherwise ordered by the Board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

(1) The operation, maintenance, repair and reconditioning of vessels provided that no established line shall be discontinued, or new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board.

(2) The completion or conclusion of any construction work upon vessels which has heretofore been begun or has been authorized by the United States Shipping Board.

(3) The sale of vessels (except to aliens) at such prices and on such terms and conditions as the United States Shipping Board may prescribe.

102 (4) The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.

(5) The operation and sale of dry docks; all sales to be subject to such terms and prices as may be established by the United States Shipping Board.

(6) The custody and sale of all other property and materials.

(7) All accounting for the United States Shipping Board Emergency Fleet Corporation.

(8) Insurance and matters pertaining to the same.

(9) The operation of all piers and pier facilities: provided that no pier or pier facilities shall be leased without prior authorization from the United States Shipping Board.

(10) The leasing and rental of offices, warehouses, docks and storage facilities.

(11) All matters incidental to any of the foregoing, including the execution of contracts, charters, bills of sale, leases, deeds and other instruments necessary or convenient to the exercise of the power and authority hereby conferred upon the United States Shipping Board Emergency Fleet Corporation; and

Be it further resolved, That an accurate record shall be made of the proceedings of every meeting of the United States Shipping Board Emergency Fleet Corporation and a summary thereof transmitted to the Chairman and each Commissioner of the United States Shipping Board, and that notices of meetings of the Board of Trustees of said Emergency Fleet Corporation be duly sent to each member of the United States Shipping Board; and

Be it further resolved, That the control of the United States Shipping Board Emergency Fleet Corporation shall remain with the United States Shipping Board, and that the President and each of the Trustees of the United States Shipping Board Emergency Fleet Corporation be and hereby are required to deposit with the Secretary of the United States Shipping Board their several resignations, for acceptance at the pleasure of the United States Shipping Board, and to deliver to the Secretary of the United States Shipping Board their several qualifying shares of stock in the United States Shipping Board Emergency Fleet Corporation, duly endorsed in blank for transfer.

103 *Exhibit "C-1"*

United States Shipping Board, Washington

RESOLUTION ADOPTED BY THE UNITED STATES SHIPPING BOARD JAN. 10, 1924

The resolution of the United States Shipping Board passed September 30th, 1921 is hereby amended to read as follows:

Whereas, The Merchant Marine Act, 1920, provides that the power and authority thereby vested in the United States Shipping Board may be exercised either directly by the Board, or by it through the

United States Shipping Board Emergency Fleet Corporation, except as therein otherwise specifically provided; and

Whereas, In the opinion of the Shipping Board, the executive and personnel organization of the Emergency Fleet Corporation is equipped to efficiently exercise through the United States Shipping Board Emergency Fleet Corporation various administrative powers and functions, thus making it possible for the United States Shipping Board to devote its attention to study and determination of the broad and constructive questions of policy relating to the maintenance, development, and encouragement of the American Merchant Marine, under the powers and duties imposed upon the United States Shipping Board by law.

Therefore, be it resolved, That it is the sense of the United States Shipping Board that neither its Chairman nor any member of the Board should hold any office of the Emergency Fleet Corporation, and that no member of any department of the Shipping Board should hold any office of the Emergency Fleet Corporation unless the Shipping Board and the Board of Trustees of the Emergency Fleet Corporation concur.

Be it further resolved, That the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall be exercised by it through the Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

1. The selection, employment, or removal of all officers and employees of the Emergency Fleet Corporation and their compensation shall be under the control of the Board of Trustees and/or officers of that corporation in the manner provided for in the By-Laws of said corporation, provided, however, that the salaries and other compensation of the officers and of the Trustees shall be subject to the approval of the Board; and provided further: the employment of counsel and all litigation shall remain under the control of the Shipping Board, which shall assign to the Emergency Fleet Corporation such attorneys as may be needed by the President of the Emergency Fleet Corporation for the proper conduct of its business.

104 2. The management, operation, maintenance, and repair of vessels; including ordinary re-conditioning of vessels.

3. The establishment and operation of lines and routes which the Shipping Board, under the powers conferred upon it by Section 7 of the Merchant Marine Act, 1920, has heretofore authorized and directed or may hereafter authorize and direct; no established line shall be discontinued, or new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board.

4. The completion or conclusion of any construction work upon vessels which has heretofore been begun or has been authorized by the United States Shipping Board.

5. The sale of vessels (except to aliens) at such prices and on such terms and conditions as the United States Shipping Board may prescribe or approve.

6. The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.

7. The operation and sale of dry docks; all sales at such prices and on such terms and conditions as the United States Shipping Board may prescribe or approve.

8. The custody and sale of all other property and materials.

9. All accounting for the Emergency Fleet Corporation.

10. The insurance of vessels and other property in its custody; and matters pertaining to insurance; subject, however, to the control and supervision of the Board, with respect to the placing of insurance.

11. The operation of piers and pier facilities owned or leased by the Shipping Board and at present used by its vessels; and the operation of such other piers and pier facilities as may be transferred to it by the Shipping Board.

12. The disbursement and expenditure of all moneys arising out of operations; and such other funds as may be allotted to it from appropriations heretofore made to the Shipping Board; or which may hereafter be made the Shipping Board; and also moneys arising from appropriations hereafter made by Congress for the exclusive use of the Emergency Fleet Corporation.

13. The leasing and rental of offices, warehouses, dock and storage facilities deemed essential by it for its business and for its terminal facilities; but no lease for a period exceeding one year shall be made without the consent of the Shipping Board.

105 14. The settlement, including payments or collections, of all matters arising out of the above-mentioned powers before or after the date of this resolution.

15. All matters incidental to any of the foregoing powers, including the execution of contracts, charters, bills of sale, leases and other instruments necessary or convenient to the exercise of such powers are hereby conferred upon the Emergency Fleet Corporation.

Be it further resolved, That an accurate record shall be made of the proceedings of every meeting of the Trustees of the Emergency Fleet Corporation and a summary thereof transmitted to the Chairman and each Commissioner of the Shipping Board.

Be it further resolved, That the voting power upon the stock and the control of the United States Shipping Board Emergency Fleet Corporation shall remain with the United States Shipping Board, according to law; and the President and each of the Trustees of the Emergency Fleet Corporation shall deliver to the Secretary of the Shipping Board their several qualifying shares of stock in the United States Shipping Board Emergency Fleet Corporation, duly endorsed in blank for transfer; and the officers of the Emergency Fleet Corporation shall deliver to the President of the Emergency Fleet Corporation their several resignations for acceptance at his pleasure; and the President and Trustees of the Emergency Fleet Corporation shall deliver to the Secretary of the Shipping Board their several resignations for acceptance at the pleasure of the Shipping Board.

Be it further resolved, That in passing this resolution the United States Shipping Board declares that it is its policy to delegate to the Emergency Fleet Corporation, all power, authority and control essential to the full and efficient operation by it of all lines at present operated or which may be hereafter authorized. All vessels now being operated are hereby allocated to the Emergency Fleet Corporation; and, other vessels of the Board will be allocated to it when reasonably required for the equipment of present lines or lines hereafter authorized. All vessels of the Shipping Board not in use, are also placed in the custody and care of the Emergency Fleet Corporation.

Be it further resolved, That nothing herein contained shall be construed as a transfer of title or ownership of vessels, docks, or other property, real or personal, belonging to the United States; the possession and control by the Emergency Fleet Corporation of any vessels or other property delivered to it under this resolution shall be solely that of an agent, with limited powers. All contracts, and agreements made by the United States Shipping Board Emergency Fleet Corporation shall clearly show that the same are contracts and agreements of the United States Shipping Board acting through the United States Shipping Board Emergency Fleet Corporation as its authorized agent.

Be it further resolved, The right and duty of the Shipping Board to exercise any and all powers of supervision and control vested in or imposed upon it by law remain in full force and effect.

Be it further resolved, That all resolutions, general or special orders or office memoranda of the United States Shipping Board heretofore passed, inconsistent with the resolution of September 30, 1921, as amended hereby, are repealed, in so far as they conflict with the provisions of this resolution.

Exhibit "D"

United States Shipping Board, Washington

RESOLUTION ADOPTED BY THE UNITED STATES SHIPPING BOARD DECEMBER 22, 1924

Whereas, it is the desire of the United States Shipping Board, as far as possible, to place the conduct of its shipping business on a basis approximating commercial precedent and practices, and

Whereas, it is the declared purpose of the Board that in the operation of ships and handling of government property by the Emergency Fleet Corporation, that the Emergency Fleet Corporation shall report to the Shipping Board as to a board of directors exercising the usual advisory capacity in the determination of broad policies and holding the management responsible for results, in the same manner as large business organizations function; and in order more clearly to define this relationship between the Shipping Board and the Emergency Fleet Corporation in line with the Board's desire as above expressed.

Therefore be it resolved, that the resolution of the United States Shipping Board passed September 30, 1921, as amended January 10th, 1924, be and the same is hereby amended to read as follows:

Whereas, The Merchant Marine Act, 1920, provides that the power and authority thereby vested in the United States Shipping Board may be exercised either directly by the Board, or by it through the United States Shipping Board Emergency Fleet Corporation, except as therein otherwise specifically provided, and

Whereas, In the opinion of the Shipping Board, the executive and personnel organization of the Emergency Fleet Corporation is equipped to efficiently exercise through the United States Shipping Board Emergency Fleet Corporation various administrative powers and functions, thus making it possible for the United States Shipping Board to devote its attention to study and determination of the broad and constructive questions of policy relating to the maintenance, development and encouragement of the American Merchant Marine,

under the powers and duties imposed upon the United States Shipping Board by law.

Therefore be it resolved, That it is the sense of the United States Shipping Board that neither its Chairman nor any member of the Board should hold any office of the Emergency Fleet Corporation, and that no member of any department of the Shipping
108 Board should hold any office of the Emergency Fleet Corporation unless the Shipping Board and the Board of Trustees of the Emergency Fleet Corporation concur.

Be it further resolved, That the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall be exercised by it through the Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

1. The selection, employment, or removal of all officers and employees of the Emergency Fleet Corporation and their compensation shall be under the control of the Board of Trustees and/or officers of that corporation in the manner provided for in the By-Laws of said corporation, provided, however, that the salaries and other compensation of the officers and of the Trustees shall be subject to the approval of the Board, and, provided further, that the selection, employment, or removal of such attorneys as are engaged in handling construction claims or litigation arising from the same shall be subject to the approval of the Board.

2. The management, operation, maintenance, and repair of vessels.

3. In accordance with the provisions of Section 7 of the Merchant Marine Act, 1920, the Shipping Board will determine the trade routes to be served. The Emergency Fleet Corporation will make such disposition and allocation of the vessels to serve these routes as will insure efficient and economical operations.

4. The completion or conclusion of any construction or reconditioning work upon vessels which has heretofore been or may be authorized by the United States Shipping Board.

5. The sale of vessels on terms and conditions laid down by the Board and at such prices as the Board approves.

6. The operation and sale of housing projects, real estate, railroad, and other similar property as approved by the Board.

7. The operation and sale of dry docks as approved by the Board.

8. The custody and sale of all other property and materials.

9. All accounting for the Emergency Fleet Corporation.

10. The insurance of vessels and other property in its custody, and matters pertaining to such insurance.

11. The management and physical operation of piers and pier warehouses and terminal facilities owned by or assigned to the Shipping Board.

109 12. The leasing and rental of offices, warehouses, docks, and storage facilities deemed essential by it for its business and for its terminal facilities.

13. The disbursement and expenditure of all moneys arising out of operations, or otherwise in connection with the delegated powers; also moneys arising from appropriations heretofore or hereafter made by Congress for the use and expense of the Emergency Fleet Corporation, as allotted by the Shipping Board, subject to the limitations of any or all acts of Congress pertaining thereto.

14. The settlement, including payments or collections, of all matters arising out of the above mentioned powers before or after the date of this resolution.

15. All matters incidental to any of the foregoing powers, including the negotiation, preparation and execution of contracts, charters, bills of sale, leases, operating agreements and other instruments necessary or convenient to the exercise of such powers are hereby conferred upon the Emergency Fleet Corporation.

Be it further resolved, That an accurate record shall be made of the proceedings of every meeting of the Trustees of the Emergency Fleet Corporation and a summary thereof be transmitted to the Chairman and each Commissioner of the Shipping Board.

Be it further resolved, That the voting power upon the stock and the control of the United States Shipping Board Emergency Fleet Corporation shall remain with the United States Shipping Board, according to law; and the President and each of the Trustees of the Emergency Fleet Corporation shall deliver to the Secretary of the Shipping Board their several qualifying shares of stock in the United States Shipping Board Emergency Fleet Corporation, duly endorsed in blank for transfer; and the officers of the Emergency Fleet Corporation shall deliver to the President of the Emergency Fleet Corporation their several resignations for acceptance at his pleasure; and the President and Trustees of the Emergency Fleet Corporation shall deliver to the Secretary of the Shipping Board their several resignations for acceptance at the pleasure of the Shipping Board.

Be it further resolved, That in passing this resolution the United States Shipping Board declares that it is its policy to delegate to the Emergency Fleet Corporation, all power, authority and control essential to the full and efficient operation by it of all lines at present operated or which may be hereafter authorized, and the full performance of all powers and authority hereby delegated. All vessels, whether active or inactive, are hereby placed in the custody and care of the Emergency Fleet Corporation.

Be it further resolved, That nothing herein contained shall be construed as a transfer of title or ownership of vessels, docks or other property, real or personal, belonging to the United States; the possession and control by the Emergency Fleet Corporation of any vessels or other property delivered to it under this resolution shall be solely that of an agent, with limited powers. All contracts, and agreements made by the United States Shipping Board Emergency Fleet Corporation shall clearly show that the same are contracts and agreements of the United States Shipping Board acting through the United States Shipping Board Emergency Fleet Corporation as its authorized agent.

Be it further resolved, The right and duty of the Shipping Board to exercise any and all powers of supervision and control vested in or imposed upon it by law remain in full force and effect.

Be it further resolved, That all resolutions, general or special orders or office memoranda of the United States Shipping Board heretofore passed, inconsistent with the resolution of January 10, 1924 as amended hereby, are repealed; insofar as they conflict with the provisions of this resolution.

111 *Exhibit "E"*

United States Shipping Board, Washington

RESOLUTION ADOPTED BY THE UNITED STATES SHIPPING BOARD ON OCTOBER 1, 1925

Whereas, in the judgment of this Board, the powers at present exercised by it through the Emergency Fleet Corporation, should be exercised under a more definite and direct supervision of this Board than has been practicable under Resolutions at present in force;

Be it resolved, the Resolutions of the United States Shipping Board adopted by it on January 10, 1924 and December 22, 1924, respectively, each of which confers powers on the Emergency Fleet Corporation and amends a Resolution of this Board dated September 30, 1921, be and each of them is hereby repealed; Provided, however, all action heretofore taken by the Emergency Fleet Corporation pursuant to and within the limitations of the powers therein granted, shall be given full force and effect.

Be it further resolved, that all that part of the Resolution of the United States Shipping Board adopted September 30, 1921, set forth below, be and the same is hereby revived and shall henceforth, until the further order of this Board, have full force and effect; the part thus re-adopted being that part reading as follows:

"Be it further resolved, that the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall until otherwise ordered by the Board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

(1) The operation, maintenance, repair and reconditioning of vessels, provided that no established line shall be discontinued, or new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board.

112 (2) The completion or conclusion of any construction work upon vessels which has heretofore been begun or has been authorized by the United States Shipping Board.

(3) The sale of vessels (except to aliens) at such prices and on such terms and conditions as the United States Shipping Board may prescribe.

(4) The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.

(5) The operation and sale of dry docks; all sales to be subject to such terms and prices as may be established by the United States Shipping Board.

(6) The custody and sale of all other property and materials.

(7) All accounting for the United States Shipping Board Emergency Fleet Corporation.

(8) Insurance and matters pertaining to the same.

(9) The operation of all piers and pier facilities; provided that no pier or pier facilities shall be leased without prior authorization from the United States Shipping Board.

(10) The leasing and rental of offices, warehouses, docks and storage facilities.

(11) All matters incidental to any of the foregoing, including the execution of contracts, charters, bills of sale, leases, deeds and other instruments necessary or convenient to the exercise of the power and authority hereby conferred upon the United States Shipping Board Emergency Fleet Corporation; and

Be it further resolved, That an accurate record shall be made of the proceedings of every meeting of the United States Shipping Board Emergency Fleet Corporation and a summary thereof transmitted to the Chairman and each Commissioner of the United States Shipping Board, and that notices of meetings of the Board of Trustees of said Emergency Fleet Corporation be duly sent to each member of the United States Shipping Board; and

113 Be it further resolved, that the control of the United States Shipping Board Emergency Fleet Corporation shall remain with the United States Shipping Board, and that the President and each of the Trustees of the United States Shipping Board Emergency Fleet Corporation be and hereby are required to deposit with the Secretary of the United States Shipping Board their several resignations, for acceptance at the pleasure of the United States Shipping Board, and to deliver to the Secretary of the United States Shipping Board their several qualifying shares of stock in the United States Shipping Board Emergency Fleet Corporation, duly endorsed in blank for transfer."

Be it further resolved, this Resolution shall be effective from the time of its passage, and the Secretary is directed to deliver at once a certified copy thereof to the office of the President of the Emergency Fleet Corporation, and henceforth the activities of that Corporation shall be based exclusively upon and within its provisions.

114 *Exhibit "E-1"*

THE COMMERCIAL NATIONAL BANK OF WASHINGTON.
Washington, D. C., December 30, 1931.

HON. HEBER M. WELLS, *Treasurer,*
United States Shipping Board Merchant Fleet Corporation,
Washington, D. C.

DEAR SIR: We have as you know been paying interest at the rate of 2½% per annum for some time on the balance you have been carrying with us.

On two occasions in the past member and associate member banks of the Washington, D. C., Clearing House Association reduced the rate of interest paid upon all accounts, both demand and time, but the question of any reduction on public money deposits was left optional with the members of the Association and, appreciating the very splendid account you have always carried with us, we did not feel that we cared to ask you to accept any reduction at the time, hoping that the generally low interest rates prevailing might stiffen but these rates continue at only slightly above the low point touched in a number of years and we would like, if agreeable to you, to pay

interest on your account at the rate of 1% per annum, effective January 1, 1932.

Awaiting your reply, we remain,

Very truly yours,

(Sgd) L. A. Slaughter,
L. A. Slaughter, *Vice President.*

LAS/em.

115 *Exhibit "F"*

The Commercial National Bank of Washington,
Washington, D. C., July 20, 1932.

Gov. Heber M. Wells,
Treasurer, United States Shipping Board
Merchant Fleet Corporation,
Room 2825 Munitions Building, Washington, D. C.

Dear Governor Wells: We are working on a plan whereby we expect to tender you United States Government bonds or Treasury notes as security for your deposit with us in exchange for the first deed of trust notes you now have secured separately on three pieces of real estate.

Will you please advise us if the substitution referred to will be acceptable to you. We may be prepared to make the exchange at any time and would like to close the transaction without delay.

With kind regards,

Cordially,

(Sgd.) L. A. Slaughter,
L. A. Slaughter, *Vice President.*

LAS/em.

116 *Exhibit "G"*

Commercial National Bank,
Washington, D. C., July 20th, 1932.

President, Merchant Fleet Corporation,
United States Shipping Board:

The Commercial National Bank of Washington, D. C., by letter of July 20th, 1932, addressed to the Treasurer of the Merchant Fleet Corporation, has asked permission to deposit United States Government bonds, or Treasury notes, as security for the deposits of Shipping Board funds now entrusted to that bank instead of the First Deed of Trust notes which we now have in our possession as security for said funds.

The amount of the deposit since the First Deed of Trust notes were accepted has been reduced to $400,000, while the bank estimates that the approximate value of the three pieces of real estate is in excess of $1,600,000.

To agree to the substitution referred to will place the Commercial National Bank of Washington, D. C., in line with the class of security heretofore accepted from other depositories, namely, Government bonds, so that it is considered that the change will be altogether advantageous.

I, therefore, recommend that the Treasurer be authorized to close the aforesaid transaction.

Elmer E. Crowley, *President.*

HWW: rh.

117 *Exhibit "H"*

"Whereas, by an agreement dated the 19th day of November 1931, this Bank pledged with the United States Shipping Board Merchant Fleet Corporation certain securities consisting of real estate notes to secure the prompt payment on demand in writing of any and all funds then on deposit or thereafter deposited to the credit of said United States Shipping Board Merchant Fleet Corporation with this Bank, and

"Whereas, said agreement provides for the substitution of securities to be held subject to the terms of said agreement,

"Now, therefore, be it resolved, that the President, any Vice President or the Cashier of this Bank request the United States Shipping Board Merchant Fleet Corporation to permit this Bank to substitute at this time and in the future from time to time as collateral security to be held under the terms and conditions of said agreement, obligations of the United States or other securities acceptable to said United States Shipping Board Merchant Fleet Corporation, and that said officers of this Bank be authorized to deliver the securities so to be substituted to said United States Shipping Board Merchant Fleet Corporation."

I hereby certify that the above resolution was duly adopted at a regular meeting of the Board of Directors of The Commercial National Bank of Washington held on the second day of August 1932, and appears upon the minutes of said meeting.

[SEAL] (Signed) F. H. Cox, *Cashier,*
The Commercial National Bank of Washington.

118 *Exhibit "I"*

THE COMMERCIAL NATIONAL BANK OF WASHINGTON,
Washington, D. C., August 2, 1932.

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION,
Washington, D. C.

DEAR SIRS: Whereas you have deposited with the undersigned certain funds of your Corporation on open account, on which we have agreed, under separate instrument, to pay certain interest, and will, from time to time, by check or draft, draw on said funds and withdraw parts or the whole thereof, and may, from time to time hereafter, deposit other funds of your Corporation in said open account.

Now, therefore, as collateral security for the repayment of any or all of said funds now or hereafter deposited in said open account and for the payment of interest thereon, the undersigned has this day delivered to you the following securities:

$200,000	U. S. Fourth 4¼s, 1933–38.
100,000	U. S. Treasury 3⅛s, 6/1/46–49.
75,000	U. S. Treasury 3⅝s, 3/15/41–43.
25,000	U. S. Treasury 3¾s, 3/15/56.
$400,000	

which securities or any substitutes therefor, or any additions thereto, either the whole or any part thereof, the undersigned hereby authorizes and empowers the United States Shipping Board Merchant Fleet Corporation, or its Treasurer, or other person authorized by resolu-

tion of the said United States Shipping Board Merchant Fleet Corporation, on the non-payment of any of said funds, to sell, at public or private sale, at any time without advertisement or notice to the undersigned, and at the option of the said United States Shipping Board Merchant Fleet Corporation, or its Treasurer, or other person authorized by resolution of the United States Shipping Board Merchant Fleet Corporation, and upon such sale the United States Shipping Board Merchant Fleet Corporation may purchase all or any part of said securities, freed and discharged of any equity of redemption. After deducting all proper costs and expenses, the residue of the proceeds of sale shall be applied to the payment of the amount due on said deposits, both principal and interest, returning the over-plus, if any, to the undersigned, and should a deficiency occur, the undersigned further promises and agrees to pay the same on demand. In case of depreciation in the market value of said securities herewith pledged, additional securities shall be added as required by you.

Of course, it is understood that so long as we are not in default, you shall clip from the bonds hereto attached interest coupons as they mature and deliver the same to us for collection, but if we are in default you are authorized to retain such coupons and collect the interest due thereon and apply the same as hereinbefore provided.

Done by authority of the Board of Directors of this Bank by resolution adopted August 2, 1932, copy of which is herewith submitted.

THE COMMERCIAL NATIONAL BANK OF WASHINGTON.

(Signed) By L. A. Slaughter,
L. A. SLAUGHTER, *Vice President.*

LAS/em.

119

Exhibit "J"

THE COMMERCIAL NATIONAL BANK OF WASHINGTON,
Washington, D. C., August 3, 1932.

Hon. HEBER M. WELLS, *Treasurer,*
United States Shipping Board Merchant Fleet Corporation, Washington, D. C.

DEAR SIR: Under an agreement dated November 19, 1931, between your Corporation and this Bank, we pledged with you first mortgage real estate notes aggregating $1,858,377.08, which notes we now wish to withdraw and substitute in place therefor the following United States Government obligations:

$200,000	U. S. Fourth 4¼s, 1933–38.
100,000	U. S. Treasury 3⅛s, 6/1/46–49.
75,000	U. S. Treasury 3⅛s, 3/15/41–43.
25,000	U. S. Treasury, 3¼s, 3/15/56.
$400,000	

The notes to be released you sent, at our request, to the Federal Reserve Bank of Richmond, in trust for your account. Will you please advise said Bank to release the said notes to us, making them subject to our instructions, when the Federal Reserve Bank is prepared to send to you the United States Government obligations

referred to above, which collateral you are to continue to hold as security for repayment of any funds belonging to your Corporation now on deposit or to be hereafter deposited with us.

A certified copy of resolution adopted at a regular meeting of our Board of Directors held August 2, covering this exchange, is enclosed herewith, together with separate pledge agreement addressed to your Corporation, the execution of which was approved by our Board of Directors on yesterday.

Very truly yours,

(Signed) L. A. Slaughter,
L. A. Slaughter, *Vice President.*

LAS/em.
Enclosures.

120 *Exhibit "K"*

Tabulation prepared by treasurer of United States Shipping Board Merchant Fleet Corporation showing deposits in Commercial National Bank of Washington, by months, November 19, 1931, to February 27, 1933, inc.

Month	Agent, deposit account	Agent, good faith deposit account
Balance November 18, 1931	$643,639.82	$64,681.25
Deposits:		
Nov. 19 to 30, 1931	46,609.88	20,023.63
December 1931	175,093.55	3,522.32
January 1932	164,769.25	28,239.11
February 1932	202,452.23	
March 1932	133,972.29	2,500.00
April 1932	144,436.41	63,200.00
May 1932	230,219.54	2,750.00
June 1932	90,615.55	1,535.94
July 1932	76,567.45	315.80
August 1932	69,420.73	1,227.01
September 1932	117,518.98	28,562.76
October 1932	132,111.65	1,377.31
November 1932	111,747.35	30.00
December 1932	101,133.44	12,912.20
January 1933	110,184.43	1,223.50
February 1-27, 1933	63,744.06	3,469.02
Total deposits	1,970,656.79	170,888.60

121 *Exhibit "L"*

JANUARY 26, 1923.

JAMES B. REYNOLDS, Esquire,
Vice-President, The Commercial National Bank,
Washington, D. C.

DEAR SIR: Referring to Treasury letter of January 18, 1923, the Treasurer of the United States has advised this office of the receipt of $5,000 4¼% Fourth Liberty Loan Bonds, forwarded by your bank as security for funds to be maintained therewith to the official credit of the United States Courts and their officers. Accordingly, by virtue of the authority vested in the Secretary of the Treasury by Section 5153 of the Revised Statutes of the United States, the Commercial National Bank has been designated a limited depositary of public moneys with authority to accept not to exceed $5,000 of deposits made by the United States Courts and their officers for credit in their

official checking accounts. Under this designation your bank is authorized to accept no deposits whatsoever for credit in the Treasurer's General Account.

The customary receipt for the collateral deposited will be forwarded to you by the Treasurer of the United States.

Treasury regulations governing limited depositaries of public moneys require the payment of 2% interest on daily balances carried on the books of such depositaries to the credit of the official checking accounts of the United States Courts and their officers, that these accounts be collaterally secured in the maximum amount at all times, and that these accounts be reported on Form 7 to the Office of the Secretary of the Treasury, Division of Deposits, on Saturday of each week in the manner indicated on the enclosed specimen copy, and on Form 18 to the Treasurer of the United States, Division of General Accounts, on Saturday of each week and on the last day of the month. The necessary supply of forms to be used by your bank in rendering reports to the Department has been forwarded under separate cover.

122 If at any time in the future the funds on deposit with your bank to the credit of the official checking accounts of the United States Courts and their officers exceed $5,000, the Treasury, without further advice from this office, will expect your bank to comply with the instructions as printed on the reverse of Form 7, by forwarding to the Treasurer of the United States additional securities of the classes outlined in paragraph 31 of Department Circular No. 176, taken at the rates therein provided of a collateral value at least equal to all funds on deposit with your bank to the credit of the official checking accounts of the United States Courts and their officers.

Your attention is especially called to paragraphs 2, 30, 31, 32, and 33 of Department Circular No. 176, excerpts from which are enclosed herewith, which indicate the requirements of the Department with regard to handling the accounts of the United States Courts and their officers.

By direction of the Secretary:

Very truly yours,

(Signed) E. D. Batchelder,
E. D. Batchelder,
Chief, Division of Deposits.

(2 Enclosures.)
CHP: w.b.

123 *Answer of Defendant Inland Waterways Corporation*

Filed September 21, 1935

* * * * * * * *

Now comes the Inland Waterways Corporation, named a defendant in the above-entitled cause, and for answer to the bill of complaint herein filed, answers and says:

1-9. This defendant admits the allegations contained in paragraphs numbered 1 to 9, inclusive, of the said bill of complaint, except the allegation in paragraph numbered 3, that the United States Shipping Board Merchant Fleet Corporation is doing business in the District

of Columbia, as to which it avers that it is without knowledge and information as to the truth thereof; and except the allegation
124 in paragraph numbered 5, as to the residence of defendant Flint, which it is advised is in the State of Mayland and not the District of Columbia as alleged.

10. This defendant admits the allegations of fact contained in sub-paragraph 1 of paragraph numbered 10 of the said bill of complaint, (1) except the allegation in sub-paragraph 1 that additional deposits were made in the savings account, as to which it says that the first deposit was the only deposit made therein. (2) It admits the allegations of fact contained in sub-paragraphs 2 to 5 inclusive, except that in respect to the securities referred to in sub-paragraph 2 it avers that those enumerated in Exhibit "A" to the Bill were not the only bonds and securities pledged. As to the other allegations of said Paragraph 10, this defendant submits that they consist of conclusions of law, to which it is not required to make answer; nevertheless, this defendant denies the same and particularly denies that the pledge of securities made by the Commercial National Bank to this defendant was unlawful and illegal as alleged in sub-paragraph 2; denies that there was no authority or capacity in said Commercial National Bank to pledge the said securities and denies that said securities (bonds) became and were a trust and were held as such by this defendant for the benefit of said bank, its depositors, creditors and stockholders, as alleged in subparagraph 3; denies that the plaintiff in redeeming a portion of the said pledged securities, as specified, acted illegally or under mistake of law and denies that the payment for the redemption of said securities of the sum specified was unlawful and erroneous and, further, it denies that such payment constituted a trust fund for the benefit of the depositors, creditors and stockholders of the said bank, as alleged in sub-paragraph 4. Furthermore, this defendant avers that if as alleged in said sub-paragraph, the plaintiff in redeeming said securities and in making the payment therefor, acted "under mistake of law", then there can be no recovery of said payment in or by this suit. This defendant also denies that the sale of the other pledged securities by it was illegal and without authority of law and denies that the proceeds of such sale became or were charged with a trust for the benefit of the depositors, creditors and stockholders of said bank, as alleged in sub-paragraph 5.

Further answering said paragraph numbered 10, this de-
125 fendant avers that the said deposits made by this defendant in the Commercial National Bank were made pursuant to express agreements entered into prior to the intial deposits and the opening of the savings deposit account and the checking account, between duly authorized officials of the said bank and officers of this defendant, whereby it was agreed that in consideration of the deposits to be made by this defendant, the Bank would deposit in the Federal Reserve Bank at Richmond, Virginia, subject to this defendant's order and control, securities to safeguard said deposits; that the said securities were deposited and made subject to this defendant's order and control and the deposit accounts were thereupon opened. Further, that after the closing of the said Commercial National Bank, and after the plaintiff had entered upon his duties as Receiver thereof, and on April 7, 1933, the plaintiff as such Receiver proposed

to this defendant by letter of that date that $245,000 par value United States Fourth 4¼ per cent Liberty Loan Bonds, said bonds being a part of the said securities, "be replaced with $245,000. cash" and requested this defendant's approval thereof and of the release of the said bonds; that said approval was given, the said bonds were delivered to plaintiff and the said payment of $245,000. was made to this defendant; that thereafter and by letter of April 20, 1933, the plaintiff as such Receiver informed this defendant that as such Receiver he would interpose no objection to the sale by this defendant, through recognized brokers, of $255,000. par value United States Treasury Bonds, said bonds being the remaining securities pledged by the said Commercial National Bank. Further, that the action of plaintiff in making the said cash payment in exchange for the specified securities and in agreeing to and approving the sale of the other securities by this defendant, was taken with the knowl-
126 edge, sanction and approval of the Comptroller of the Currency.

This defendant therefore avers that even if, as alleged, the pledge and deposit of the said securities by the Commercial National Bank was originally unlawful and illegal and without authority of law, nevertheless, having, more than two years prior to the institution of this suit, proposed and effectuated an exchange of a portion of the pledged securities, and having likewise more than two years prior to the institution of this suit, consented to and authorized the sale of the balance of said securities, the plaintiff is in pari delicto, with this defendant in respect to this transaction, and cannot maintain this suit, and comes into equity without clean hands.

Further answering paragraph 10, this defendant avers that the demanding of security for the funds of the corporation was pursuant to its by-laws, promulgated on August 7, 1924 by the Secretary of War. Under said by-laws the Secretary-Treasurer of the corporation was named an accountable officer, and his duties specified thus:

"It shall be his duty to collect, receive, and hold the moneys, notes, bonds, certificates of stock, and other evidences of value and security of the Corporation, and deposit them in such depositaries under such conditions as may be approved by the Secretary of War."

The Secretary of War approved the deposit of the funds of the defendant in the Commercial National Bank, and required the Secretary-Treasurer to secure the deposits of funds by the pledging of bonds for the safekeeping of the funds in question, in accordance with the provisions of the by-laws aforementioned.

That such action in requiring security and action by the Commer-
cial National Bank in giving it was in accordance with a prac-
127 tice and custom which had prevailed for many years in respect of deposits of other funds which were under the control of or administered by other departments or agencies, or officers of the United States, or with respect to which such departments, agencies or officers had or performed any duties or functions and such practice and custom had continued without objection or question until after the closing of the various banks in which such funds were deposited; that such practice and custom were known to the respective Comptrollers of the Currency during the period since its adoption and up to and subsequent to the purchase and sale of the securities herein involved; that no objection thereto was ever raised or made by any

of the said Comptrollers and said practice and custom aforesaid were recognized and received and had the approval and sanction of said officials.

Further answering, this defendant avers that prior to its creation by the Act of June 3, 1924, 43 Stat. 360, 49 U. S. Code, section 151, and during the period of Federal control, the President of the United States, through the Railroad Administration, acting as his agent or designate, acquired by purchase, for the purpose of establishing a barge line on the Mississippi River as an aid in the national defense, all available floating equipment in that region. Such acquisition was authorized under the fourth paragraph of section 6 of the Federal Control Act of March 21, 1918, 40 Stat. 451, which provided that from the revolving fund created by section 6 of that Act, the President might expend such an amount as he might deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways and that in the operation and use of such facilities, might create or employ such agencies and enter into such contracts and agreements as he should deem in the public interest.

128 The equipment thus purchased remained under the control of the Railroad Administration until the effective date of the Transportation Act of 1920, when it was transferred to the Secretary of War by section 201 of that Act (U. S. Code, Title 40, section 141) which provided so far as material here:

"Sec. 201. On the termination of Federal control, as provided in section 200, all boats, barges, tugs, and other transportation facilities, on the inland, canal, and coastwise waterways * * * acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act * * * are transferred to the Secretary of War, who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued, and assume and carry out all contracts, and agreements, in relation thereto entered into by or through the President. * * * All payments under the terms of such contracts * * * shall be made out of moneys available under the provisions. * * * Money required for such payments shall from time to time be transferred to the Secretary of War, as required for payment under the terms of such contract.

"(b) All other payments after such transfer in connection with the construction, utilization and operation of any such transportation facilities * * * shall be made by the Secretary of War out of funds now or hereafter made available."

Said section 201 was amended by the Act of March 4, 1921, 41 Stat. 1392 to enlarge the power of the Secretary of War in certain respects. In and by that act there was appropriated $1,225,000 "for additional expense incurred in the operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act of March 21, 1918, and operated in pursuance of section 201 of the Transportation Act, * * *."

Section 500 of the Transportation Act, 1920, declared and provided as follows:

"It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States and to foster and preserve in full vigor both rail and water transportation.

"It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway
129 transportation facilities in connection with the commerce of the United States to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation; * * *."

Following the transfer of the property as provided by said section 201 of the Transportation Act, 1920, the Secretary of War, pursuant to the mandate of said section and subsequent enactments of Congress set forth or referred to above, carried on operations of the Inland and Coastwise Waterways Service. Receipts from such operations were placed in the general fund of the Service and disbursed as needed; funds to cover deficits were appropriated by Congress; at no time during such operations were the funds used in such operations deposited in the Treasury of the United States as general public funds; there was an annual deficit up to the time of the creation of the Inland Waterways Corporation.

The Act of June 3, 1924, 43 Stat. 360, by which this defendant was incorporated, declared the purpose of the Congress in creating this defendant corporation to be "of carrying on the operations of the Government-owned inland, canal, and coastwise waterway system to the point where the system can be transferred to private operation * * * of carrying out the mandates of Congress prescribed
130 in section 201 of the Transportation Act of 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such act * * *."

The said Act fixed the capital stock of the corporation at $5,000,000, subscribed for by the United States and to be paid to the Secretary of War, who the Act provided should be the incorporator, and who should govern and direct the corporation in the exercise of its functions; the said Act appropriated said sum for the payment of such subscription.

By section 3 of the said Act, the corporation was directed to continue the operation of the transportation and terminal facilities then being operated by the Secretary of War under section 201 of the Transportation Act, 1920, and, as soon as there was an improved channel sufficient to permit the same, initiate the water carriage theretofore authorized upon the Mississippi River above St. Louis. By section 5, it was provided that the corporation, among other things:

"(g) May exercise any of the functions vested in the Secretary of War by sections 201 and 500 of the Transportation Act, 1920, as amended.

"(i) May, in the exercise of such functions, conduct the business of a common carrier by water, and maintain, manage, and operate properties held for or used in the service of transportation, or necessary or convenient to such use; and

"(j) In addition to the powers specifically granted, shall have such powers as may be necessary or incidental to fulfill the purposes of its creation."

Section 6 (a) directed the Secretary of War to transfer to the corporation all assets acquired, constructed, or operated by or under the direction of the said Secretary, or which reverted to the United States, under section 201 of the Transportation Act, 1920. Section 6 (b) conferred upon the corporation all the rights, privileges, powers, duties, and liabilities of the said Secretary in respect to the functions exercised by him in respect of this service and section 6 (c) made available to the corporation for expenditure, or the making of loans by it, all money then available and all money repaid on loans.

The capital authorized and appropriated by the said Act proved insufficient to adequately carry out the mandates imposed upon
131 this defendant and by the Act of May 29, 1928, 45 Stat. 978 (the so-called Denison Act) Congress increased the capital stock to $15,000,000, and appropriated $10,000,000 additional for its stock subscription.

The said Denison Act authorized the extension of barge line service on the Mississippi River above St. Louis. It also set forth the policy of Congress in regard to the future operations of the Corporation, as follows:

"It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers: and (4) private persons, companies, or corporations engaged, or are ready and willing to engage, in common-carrier service on such rivers."

It also stated the terms upon which the facilities of the corporation may be leased or sold, which must be approved by the President. This amendment to the original Act required that the Corporation and private carriers must obtain certificates of public convenience

and necessity; continued the provision that the corporation's transportation and terminal facilities should be subject to the Interstate Commerce Act "in the same manner and to the same extent as if such facilities were privately owned," and added the provision:

"All vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels."

The final section directed the Secretary of War to investigate the cost of the proposed inland water route from Boston to Beaufort, N. C., to determine the feasibility and advisability of extending the service of the Corporation to the waterways included in such a route, "and to report thereon to the Congress as soon as practicable."

132 This defendant avers that as is apparent from the legislation referred to, it was created as an instrumentality of the United States for the carrying out of the declared policy contained in section 500 of the Transportation Act, 1920, and for the purpose of constructing, enlarging and making available for water transportation purposes, internal waterways, terminals and other facilities incident to and necessary in development thereof; that as such, its power and duties and liabilities are subject to the absolute control and direction of the United States through Congress; that all its assets are assets of the United States and subject to the latter's will and disposition; that except for revenues received from operations, its only source of receipts is from the appropriations made by Congress as a stock subscription; that all moneys held by it are public moneys received either from Congress as aforesaid, or derived from the operations of the corporation, which said operations are conducted in the interest and for the benefit of the people of the United States; that any decree or judgment against this defendant as prayed in this suit would materially affect the United States in respect to its assets and resources.

Further answering, this defendant avers that if, as alleged in said paragraph numbered 10, the said Commercial National Bank had no authority to pledge or deliver the said securities to insure the deposits made by this defendant, all moneys deposited by this defendant in the said bank, as specified in said paragraph 10, the same being public moneys were received and held by the said Bank unlawfully and in violation of law; that by so receiving and holding said moneys, the said Bank held the said moneys as a trustee ex malificio for this defendant and the said plaintiff as Receiver so held them and the said moneys were held in trust by the said Bank and the said plaintiff as Receiver, for the benefit of this defendant; that full payment and satisfaction having been made by the said plaintiff, as receiver, by the cash payment in redemption of a portion of the securities and by the sale of the balance of the other securities, there can be no recovery therefor in this suit.

133 And for further answer this defendant says that if the bank was without authority to pledge the bonds, the contract was at the most only ultra vires; and having received the benefits of said contract by inducing the defendant to deposit its money with it, the plaintiff was in equity bound to perform its contract to safeguard the funds of the defendant; which contract it has fully performed; and having so performed, it cannot now disavow that contract and receive back the sum here in question.

And for further answer, this defendant says, that if the contract pledging the bonds in question was ultra vires, the equity of the defendant is prior to that of the depositors and creditors of the bank in this; that it could have demanded the return of its deposits in full at any date following the making of such deposits in the plaintiff bank; while the equity of the depositors to have the assets of the bank distributed equally among them attached only upon the failure of the said plaintiff bank, to wit, February 27, 1933; and having recognized the priority of the defendant in the funds in question, and having made restitution as equity demanded, the plaintiff is barred from recovery in this court.

134 For a further answer, this defendant avers and says, that plaintiff ought not to have and maintain this suit for the following reasons:

1. The said plaintiff is guilty of laches such as in equity should bar him from the relief sought, since the transactions complained of occurred more than two years prior to the institution of this suit.

2. The bill of complaint is multifarious, since it seeks discovery, accounting, and relief against defendants other than this defendant in respect of matters and things in which this defendant is not involved and has no interest or concern.

3. The plaintiff has a plain, adequate and complete remedy at law.

Answering paragraphs numbered 11 to 14 inclusive of the said bill of complaint, this defendant avers that it has no knowledge of, interest in, or concern with, the matters and things set forth in said paragraphs and that the allegations therein contained state no cause of action against it.

WHEREFORE, having made full answer, this defendant prays that the bill of complaint be dismissed as to it, with costs against the plaintiff.

INLAND WATERWAYS CORPORATION.
By T. Q. ASHBURN, *President.*

LESLIE C. GARNETT,
United States Attorney.
H. L. UNDERWOOD,
Assistant United States Attorney.
LOYOLA M. COYNE,
Attorney, Inland Waterways Corp.
Attorneys for defendant, Inland Waterways Corporation.

135 DISTRICT OF COLUMBIA, *ss:*

T. Q. Ashburn, being first duly sworn, deposes and says: that he is President of the Inland Waterways Corporation, one of the defendants in the above entitled cause; that he makes this affidavit and verification as such President for the said corporation; that he has read the foregoing answer by him subscribed and knows the contents thereof; and that he verily believes the facts stated therein to be true.

T. Q. ASHBURN, *President.*

Subscribed and sworn to before me this 21 day of September, 1935.

J. W. JENKINSON.
Notary Public, D. C.

136 *Stipulation as to answer of United States Shipping Board Fleet Corporation*

Filed June 15, 1936

* * * * * * *

It is stipulated that the answer of the defendant United States Shipping Board Merchant Fleet Corporation, heretofore, to wit, on September 19, 1935, filed in this cause, shall for all purposes be taken, treated, and considered as the answer of the said defendant, United States Shipping Board Merchant Fleet Corporation, to the amended bill of the plaintiff filed herein on June 4, 1936.

SHERLEY, FAUST & WILSON,
by CHARLES F. WILSON
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for defendant, United States Shipping Board Merchant Fleet Corporation.

F. R. CONWAY,
Of Counsel.

Stipulation as to answer of Inland Waterways Corporation

Filed July 14, 1936

* * * * * * *

It is hereby stipulated by the plaintiff and the defendant Inland Waterways Corporation, acting by their respective attorneys, that the answer to the original bill of complaint herein filed by and on behalf of the said defendant on September 21, 1935, may and shall be taken, considered, and accepted as and for the answer of said Inland Waterways Corporation to the amended bill of complaint filed herein on June 4, 1936.

SHERLEY, FAUST & WILSON,
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Ass't United States Attorney.
Attorneys for Defendant Inland Waterways Corporation.

137 *Suggestion of death and order of substitution*

Filed October 6, 1936

* * * * * * *

This cause having come on for further consideration, upon the suggestion made in open Court by counsel for the plaintiff and de-

fendants herein of the death of defendants George H. Dern and Arthur L. Flint, and it appearing to the satisfaction of the Court that Harry H. Woodring has succeeded the decedent George H. Dern as Secretary of War and that H. A. A. Smith has succeeded the decedent Arthur L. Flint as General Purchasing Officer and Chief of Washington Office, The Panama Canal, it is by the Court this 6th day of October, 1936

Ordered, that Harry H. Woodring be, and he hereby is, made a party defendant herein in the place and stead of George H. Dern, deceased, and it is further ordered that H. A. A. Smith be, and he hereby is, made a party defendant herein in the place and stead of Arthur L. Flint, deceased.

ALFRED A. WHEAT, *Chief Justice.*

138 *Answer of defendants Harry H. Woodring, Secretary of War, H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, to amended bill of complaint.*

Filed October 31, 1936

* * * * * * *

Come now Harry H. Woodring, Secretary of War, H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, named defendants in the above-entitled cause, and for answer to the amended bill of complaint herein filed, or to such part or parts thereof as they are advised it is material for them to answer, answer and say:

1–3. Defendants admit the allegations contained in paragraphs numbered 1 to 3, inclusive, of the amended bill of complaint, except that they are without knowledge or information as to whether the United States Shipping Board Merchant Fleet Corporation is doing business in the District of Columbia as alleged in paragraph 3.

4. Defendants admit that George H. Dern was, at the time of the filing of the amended bill of complaint, Secretary of War, but aver that he has since died and that defendant Harry H. Woodring is now Secretary of War and that as such, he has been substituted as a party defendant in the place and stead of said George H. Dern.

5. Defendants aver that Arthur L. Flint was at the time of
139 the filing of the original bill of complaint, General Purchasing Officer and Chief of the Washington Office, Panama Canal, but that he died on or about May 18, 1936, and that H. A. A. Smith has succeeded him and has been substituted in his official capacity only as a party defendant in the place and stead of said Arthur L. Flint; that his title in said office is Chief of Office and General Purchasing Officer, Panama Canal.

6–8. Defendants admit the allegations contained in paragraphs numbered 6 to 8, inclusive, of said amended bill of complaint.

8 (a). These defendants admit the allegations concerning the citizenship and temporary residence of defendant Henry Morgenthau, Jr., as alleged in paragraph numbered 8 (a).

8 (b). These defendants deny that Harry H. Woodring and H. A. A. Smith are sued as individuals in this cause; on the contrary, they aver that they are made parties in their respective official capacities only by substitution in place of their predecessors in office.

9. Defendants admit the allegations contained in paragraph numbered 9 of said amended bill of complaint.

10–11. These defendants aver that they have no knowledge of, interest in or concern with, the matters and things set forth in paragraphs 10 and 11 of the said bill of complaint and that the allegations therein contained state no cause of action against them or any of them.

12. Defendants Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, aver that they have no knowledge of, interest in or concern with, the matter and things set forth in paragraph 12 of the said bill of complaint and that the allegations therein contained state no cause of action against them or either of them.

Defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, The Panama Canal, answering said paragraph numbered 12, admit the opening the deposit account specified in the said Commercial National Bank, pursuant to the contract entered into by the said Bank and the then
140 Secretary of War as alleged in subparagraph one of said paragraph 12; admit the depositing in said Bank of further sums of money in said account and that the balance due on said account at the time of closing of said Bank was as stated in said paragraph.

Said defendants admit the pledge of bonds of the amount and as described, and the delivery thereof to the then General Purchasing Officer and Chief of the Washington Office, The Panama Canal for the purpose and as alleged in subparagraph two of said paragraph 12 but they deny that said pledge was unlawful and illegal as alleged in said subparagraph and they further deny that there was no authority or capacity in the said Bank to pledge said bonds as security for the deposits and deny that said bonds were held in trust by the then Secretary of War or are so held by his successor in office, or by the then defendant General Purchasing Officer and Chief of the Washington Office, The Panama Canal, as alleged in subparagraph three of said paragraph 12. Further, these defendants deny that they or either of them so hold said bonds or any of them.

Said defendants admit the allegations of fact contained in subparagraph four of paragraph 12 but deny that the said bonds became or were a trust and were held as such by the then Secretary of War or the then General Purchasing Officer and Chief of the Washington Office, Panama Canal, or are so held by their successors in office for the alleged beneficiaries, and deny that plaintiff is entitled to the return of said bonds or to the proceeds thereof as alleged in said subparagraph. Further, these defendants aver that if the said plaintiff, in consenting or acceding to the taking over by the then General Purchasing Officer and Chief of the Washington Office of the bonds pledged as security for the deposit aforesaid, acted "under mistake of law" as alleged in said subparagraph, he is not entitled to a recovery as sought by this suit.

Further answering said paragraph, said defendants aver that the making of the contract for the deposit and delivery of said securities, a copy of which is made Exhibit C–1 to the bill of complaint and is

incorporated in this answer by reference, was within the authority and power of the Secretary of War conferred upon him by Acts of Congress and by regulations promulgated pursuant to statu-
141 tory authority; that the securities pledged pursuant to the terms of said contract were lawfully in the possession of the then Secretary of War; that the deposits for which said securities were pledged were at the time of the closing of said bank, almost entirely composed of moneys received by the Postal Service of the Canal Zone and consisted of deposit money order funds and money order funds, which the United States is obligated to redeem and pay.

Further, said defendants aver that by the Panama Canal Act of June 28, 1902, and the supplementary Act of April 28, 1904, the President of the United States was given complete governmental control over the Canal Zone with power to legislate either directly or through the Isthmian Canal Commission, or such other persons as he might designate; that the President authorized the Secretary of War to exercise these powers on his behalf; that the then Secretary of War in 1904 directed the Isthmian Canal Commission to establish a postal service in the Canal Zone and said service was established by Act No. 7 of September 2, 1904, of the said Commission; Section 42 of said Act provided that the Postal Service of the Canal Zone should "be conducted, regulated and controlled by such of the laws, rules and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission," this provision being re-enacted in the Act of February 16, 1933, 47 Stat. 812, as a part of the Canal Zone Code then in course of enactment. Further, that by section 1 of the Act of August 21, 1912, c. 387, 37 Stat. 512, U. S. Code, Title 39, section 759, it was provided, with respect to Postal Savings funds of the United States, that such funds should be deposited in solvent banks, whether organized under national or State laws, being subject to national or state supervision and examination and that "the board of trustees shall take from such banks such securities in public bonds or other securities, authorized by act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand." These defendants aver that the provision of said section insofar as it required security for postal savings funds was not inapplicable, but was appli-
142 cable, to deposit money orders issued in the Canal Zone; and that it made it incumbent upon the Secretary of War, and those under his supervision having direct control of the funds, to require security from banks before making deposits, and authorized the bank to give such security; further, that Section 2 of the Panama Canal Act of August 24, 1912, 37 Stat. 560, ratifying and confirming as valid and binding "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government * * * of the Canal Zone" ratified and confirmed the directions and actions of the Secretary of War in requiring the deposit of securities to safe-guard the public moneys of the Canal Zone under his supervision; further, that Section 6 of the Act of August 21, 1916, 39 Stat. 528, authorized the issue of deposit money orders in the Canal Zone, in lieu of postal savings certificates then in existence, and, by Section 7 of said Act, ratified the action

taken by the Secretary of War in depositing money order funds in banks under Canal Zone regulations, and authorized the use of interest received therefrom to pay interest on deposit money orders, and any losses chargeable to the Canal Zone Postal Service, and that this was further ratified and confirmed by Section 11 of the Act approved September 21, 1922, increasing the interest rate on deposit money orders to not to exceed 3%; that in conformity with the orders of the President of October 22, 1916, and December 6, 1933, the Governor of The Panama Canal was authorized to prescribe detailed regulations to carry out the terms of the order, and that the Governor did, by Circular No. 660–61 of April 5, 1923, provide that:

"Postal savings, money order, cashhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor."

that is, the Auditor of The Panama Canal, whose position was established by Executive Order of the President, and who had supervision of the Department having charge of the "collection, custody, and disbursement of funds for the Panama Canal and Canal Zone."

Further answering said paragraph 12, said defendants aver that the said contract of May 11, 1910, copy of which is made
143 Exhibit C–1 to the bill of complaint and is incorporated into this answer by reference, was made and entered into as renewal, amendment of, or substitute for an agreement of similar character and terms between the same parties, under date of January 19, 1909; that to said contract of May 11, 1910, there was a supplemental agreement, dated April 13, 1913; that the action of the Secretary of War and his subordinates in negotiating for the giving of security to safeguard the deposits and of entering into said contracts was the subject of correspondence between both the Secretary of War and The Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury, and the entering into of the said contract of May 11, 1910, was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury.

That said practice and custom, thus initiated, were recognized, acted upon and adopted in respect of other deposits of funds which were under the control of or administered by other departments or agencies of the United States and continued without objection or question or challenge for more than twenty years and until after the closing of the various banks in which such funds were deposited.

These defendants further aver that said practice and said custom were also known to the respective Comptrollers of the Currency during the said period of more than twenty years and up to and subsequent to the transactions complained of in subparagraph four; that no objection thereto was ever raised or made by the said Com'trollers or any of them and the said practice and custom aforesaid were recognized and received and had the approval and sanction of said officials. Further, that the taking over of the bonds by the then General Purchasing Officer and Chief of Washington Office, Panama Canal, as alleged in subparagraph four of said Paragraph 12, was likewise sanctioned and approved by the Comptroller of the Currency.

Further, that Congress was informed that security for deposits of Canal Zone funds was being exacted of, and given by, banks through annual reports of the Isthmian Canal Commission made to it for the years 1913 to 1916, inclusive, and also by reports made to it by Congressional Committees on proposed legislation for the Canal Zone.

For a further and separate defense to the alleged cause of
144 action set forth in said paragraph 12, these defendants say that the plaintiff ought not to have and maintain this suit, for the following reasons:

1. The said deposit made in the Commercial National Bank was of monies of the United States so deposited by agents of the United States; that the said securities were pledged to insure said deposit and were given and received for the United States; the taking over thereof was for and on behalf of the United States; that any decree or judgment against these defendants would affect materially the United States in respect of its resources and assets; that the United States is, therefore, the real party interest as a defendant and an indispensable party to this suit in whose absence the Court ought not to proceed.

2. The plaintiff has a plain and adequate remedy at law against the United States in the United States Court of Claims for the amount claimed.

3. The bill of complaint is multifarious since it seeks discovery and relief against defendants other than these defendants in respect to matters and things in which these defendants are not involved or concerned or have any interest.

4. That plaintiff is not entitled to any recovery against these defendants or either of them, since he consented to and acquiesced in the taking over of the securities by the then General Purchasing Officer and Chief of Washington Office, Panama Canal; by reason whereof, plaintiff is estopped from suing or recovering.

5. The plaintiff is not entitled to any recovery or relief against defendants because of the doctrine in pari delicto, potior est conditio, defendentis.

13. These defendants aver that they have no knowledge of, interest in, or concern with, the matters and things set forth in paragraph numbered 13 of the said bill of complaint and that the allegations therein contained state no cause of action against them or any of them.

14. Defendant H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, avers that he has no knowledge
145 of, interest in, or concern with, the matters and things set forth in paragraph numbered 14 of said bill of complaint and that the allegations therein contained state no cause of action against him.

Defendants Harry H. Woodring, Secretary of War, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, answering said paragraph admit the allegations of fact therein contained except the allegation in subparagraph two that the pledge of the assets of the bank was to the then Secretary of War, which allegation they deny and on the contrary aver that said pledge was to the Government of the Philippine Islands; concerning the conclusions of law therein contained, defendants submit that they are not required to make answer thereto; nevertheless, they specifically deny that the pledging of the securities by the Commercial National Bank was unlawful or illegal on its part, as alleged in

subparagraph two; deny that there was no authority or capacity in the said bank for the pledging of said securities as alleged in subparagraph three and deny that said securities or the proceeds thereof were or are held in trust by these defendants or either of them or were so held by their predecessors in office, for the benefit of said bank, its stockholders, depositors or creditors as alleged in subparagraph three and four of said paragraph 14; deny that the sale of said securities was illegal or without authority of law as alleged in subparagraph four; deny that the payment made by plaintiff to defendant Creed F. Cox set forth in said subparagraph was illegal or made under mistake of law and as to such payment, these defendants say that if, as alleged, the said payment was made by plaintiff "acting under mistake of law," there can be no recovery thereof.

Answering subparagraph 5 of said paragraph 14, defendants admit allegations as to the official status of defendant C. F. Brown; as to the power of the Court asserted in said subparagraph, these defendants submit that no answer is required of them.

15. These defendants admit that the proceeds of the sale of the bonds, described in paragraph 14 (not paragraph 8 as alleged)
146 and the amount paid to the defendant Chief of the Bureau of Insular Affairs, alleged in subparagraph 4 of said paragraph 14, were transmitted to and placed with the Chase National Bank of the City of New York as alleged in paragraph 15 of the amended bill of complaint. Defendants are without knowledge or information sufficient to form a belief as to whether, as alleged in said paragraph numbered 15, said proceeds and the amount of the said payment made to the defendant Chief of the Bureau of Insular Affairs or any part thereof were transmitted to defendant Henry Morgenthau, Jr., and therefore deny the allegation to that effect and demand strict proof thereof, if the same be material. Defendants further deny that the monies deposited with defendant Morgenthau, Jr., were or are funds of the plaintiff herein and deny that said Morgenthau, Jr., received and holds the same in trust for plaintiff; on the contrary, these defendants aver that said proceeds and the amount of said payment were and are monies of the government of the Philippine Islands and were deposited with the said Chase National Bank to the credit of the Treasurer of the Philippine Islands; that said bank had been designated as a branch of the Philippine Insular Treasury and as a depositary of the government of the Philippine Islands.

Further defendants aver that the monies alleged to have been transmitted by the said Chase National Bank and held by and in the custody of defendant Henry Morgenthau, Jr., are monies of the Government of the Philippine Islands and are held by him as Secretary of the Treasury under the authority of the Act of June 11, 1934, 48 Stat. 929.

Further answering said amended bill of complaint, defendants aver that section 625 of the Revised Administrative Code of 1917 of the Philippine Islands was and is authority for the requirement
147 of security to insure deposits of funds of the Philippine Government and constituted ample authority for the giving of the security herein involved by the Commercial National Bank and the receipt of it by the then Secretary of War. That said section 625 is as follows:

"The Governor-General may appoint any bank or banking institution in the Philippine Islands, and the Secretary of War any similar institution in the United States, as a depositary of the Government of the Philippine Islands, after such institution has filed sufficient evidence of its sound financial condition and has deposited, as security, either in the Insular Treasury or in the Bureau of Insular Affairs, at Washington, bonds of the United States or of the Government of the Philippine Islands or other bonds or securities satisfactory to and approved by the officer making the appointment and in such amount as shall be required by him."

That the enactment of said section was reported to the Congress of the United States, pursuant to the requirement of section 19 of the Act of Congress of August 29, 1916, Ch. 416, 39 Stat. 551, which provides that:

"All laws enacted by the Philippine Legislature shall be reported to the Congress of the United States, which reserves the power and authority to annul the same."

That Congress did not annul said enactment and thus tacitly approved the same.

That substantially similar provisions to those contained in said section 625 were contained in an enactment of the Philippine Commission of October 12, 1907, (Section 596, Compilation of Acts of the Philippine Commission). These two provisions were expressly recognized and continued in force and effect by section 6 of the said Act of August 29, 1916, 48 U. S. Code, 1004.

Further answering said amended bill of complaint, said defendants aver that the giving of the said bond by the Commercial National Bank a copy of which is made Exhibit "E-1" to the bill of
148 complaint herein and made a part of this answer by reference, and the deposit of the securities was in accordance with a practice and custom in respect of funds of the Philippine government which has existed and continued since the year 1908; that during said period, the various Secretaries of War, acting under the provisions of said section 596 enacted October 12, 1907, and said section 625, of the Revised Administrative Code, have from time to time designated certain state and national banks within the continental limits of the United States as depositaries for funds of the Philippine Government and people, the several Governors-General of the Philippine Islands have designated the same banks as branches of the Insular Treasury, and the Treasurers of the Philippine Islands have placed and kept on deposit therein large amounts of the public funds of the People of the Philippine Islands, for the purpose of maintaining the parity of Philippine bonds, notes, coinage and currency; that the total amount of such deposits in the United States formerly approximated $63,000,000, and these deposits were formerly distributed among 39 national banks and 18 state banks.

That each depositary bank was required to deposit, and deposited with or to the order of the Chief of the Bureau of Insular Affairs, War Department, collateral security of a value equivalent to the amount of the deposit, in each instance under a formal pledge agreement in writing authorizing recourse by the pledgee to the pledged collateral in the event of a failure to repay the amount of the deposit; that such custom and practice were recognized, well-known, acted upon and continued without objection, question or challenge for about twenty-five years and until after the closing of the Commercial

National Bank; that such custom and practice were also known to the respective Comptrollers of the Currency during the said period since its adoption and up to and subsequent to the sale of the said securities; that no objection thereto was ever raised or made by any of the said Comptrollers and said practice and custom aforesaid were recognized and received and had the approval and sanction of said officials;

Further, that the Comptroller of the Currency was also aware of and was consulted with, concerning the proposed sale of the said securities here involved and took no action to prevent it but
149 sanctioned and approved the said sale; that the plaintiff, as receiver of the said Commercial National Bank, interposed no objection to said sale and acquiesced therein.

Said defendants further aver that said practice and custom of requiring and receiving security has obtained for many years in respect of deposits of other funds which were under the control of or administered by other departments or agencies, or officers of the United States, or with respect to which such departments, agencies or officers had or performed any duties or functions and such practice and custom continued without objection or question until after the closing of the various banks in which such funds were deposited.

Further answering said amended bill of complaint, these defendants aver that defendants Woodring and Brown had no part or participation, either officially or personally in the transactions complained of in said bill and that defendant Cox likewise had no part or participation therein, except the receipt by him, as Chief of the Bureau of Insular Affairs, of the payment of $6,154.41 made by the plaintiff herein, as alleged in subparagraph 4 of paragraph 14 of the amended bill; that defendants Woodring and Brown had at no time and do not now have any authority, control or supervision over, or functions in respect of, the said funds deposited in the said Chase National Bank and which it is alleged were in whole or in part, transferred and placed in the custody of defendant Henry Morgenthau, Jr.; that defendant Cox, as Chief of the Bureau of Insular Affairs of the War Department, in respect of moneys in the Chase National Bank to the credit of the Treasurer of the Philippine Islands has authority to order the transfer thereof to the United States Treasury or to the Philippine National Bank of New York City; in respect of deposits of moneys made under the said Act of June 11, 1934 (48 Stat. 929), in the United States Treasury and which are deposited to the credit of the Treasurer of the Philippine Islands, said defendant has authority to order the transfer thereof to the said Chase National Bank; except as herein specified, said defendant Cox has no authority, control or supervision over such monies, funds or deposits.

For a further and separate defense, the said defendants say that the plaintiff ought not to have and maintain his suit for the following reasons:

1. The funds sought to be recovered are funds of the Gov-
150 ernment of the Philippine Islands, and the bond given and the pledge of securities made to insure the deposits made in the Commercial National Bank were given and made to the Government of the Philippine Islands, which is the real party in interest herein.

1. Error in declining to hold that the securities of the bank were lawfully and in substantial conformity to section 5153 of the Revised Statutes (U. S. C., title 12, sec. 90), pledged as security for the safekeeping and prompt payment of the money deposited by this defendant with the Commercial National Bank of Washington, D. C.

2. Error in declining to hold that all deposits by this defendant with said bank were public money of the United States.

3. Error in declining to hold that, if the pledging by said bank of its securities as security for the safekeeping and prompt payment of the money deposited by this defendant with said bank was ultra vires and void, each such deposit was received by said bank without its having given security in respect thereof and in violation of the penal provisions of U. S. C., title 18, section 182, from which
174 it resulted that at the instant of each such deposit said bank became trustee ex maleficio with respect thereto, and the commingling of each such deposit with money of said bank was a conversion thereof, and the trust was transferred to and imposed upon the pledged securities, because that was the intent of the parties, the evidence of that intent being the pledge agreement.

4. Error in declining to hold that the plaintiff cannot recover of this defendant, because, on July 1, 1933, without prior notice to this defendant of any adverse claim with respect to the pledged securities or the proceeds thereof, the pledged securities had been converted into money by the Treasury Department of the United States, this defendant's principal, and the proceeds of said securities commingled in the United States Treasury with other public money, and the only appropriation act by authority of which disbursement thereof could be made had expired June 30, 1933.

5. Error in declining to hold that no trust can be impressed upon the pledged securities, because they have passed out of this defendant's control, and have been sold; or upon the proceeds, because, having been commingled in the United States Treasury with other public money, they cannot be identified.

6. Error in declining to hold that, because this defendant has been dissolved by the Merchant Marine Act, 1936 (49 Stat. 1985), it cannot possess or control anything—there is nothing on which a trust can be impressed.

7. Error in declining to hold that this suit cannot be maintained because in substance it is a suit against the United States, and not within the jurisdiction of this court.

8. Error in sustaining the motion of the plaintiff for an order striking out portions of the answer of this defendant.

175 9. Error in sustaining the motion of the plaintiff for decree pro confesso against this defendant.

10. Error in rendering final decree against this defendant.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for Defendant,
United States Shipping Board, Merchant Fleet Corporation.

Service of copy of the within and foregoing assignment of errors hereby is acknowledged this 27th day of September 1937.

GEORGE B. SPRINGSTON,
Attorney for Plaintiff.

176 *Assignment of errors on behalf of Harry H. Woodring, Secretary of War and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal*

Filed September 27, 1937

* * * * * * * * *

(1) The Court erred in holding and determining that there was no authority for the pledging by the Commercial National Bank of the securities involved to safeguard the deposits of the funds of the Panama Canal and in not holding and determining that such authority existed.

(2) The Court erred in not holding and determining that the giving of the securities by the Commercial National Bank was warranted by custom and usage long established, well recognized and unquestioned for many years, and also sanctioned by the Secretary of the Treasury and the Comptroller of the Currency.

(3) The Court erred in not holding and determining that the plaintiff was estopped from bringing and maintaining this suit by the action of his predecessor, the Receiver of the said bank, approved by the Comptroller of the Currency, in agreeing to the taking over of the securities by these defendants.

(4) The Court erred in not holding and determining that even if the pledge of the securities was illegal, nevertheless the plaintiff was not entitled to recover since the parties stand in pari delicto.

(5) The Court erred in not holding and determining that the United States is an indispensable party to this suit insofar as the funds of the Panama Canal are concerned.

(6) The Court erred in not holding and determining that the answer of these defendants constituted a complete defense to
177 the suit against them; and in not overruling plaintiff's motion to strike and for a decree pro confesso.

(7) The Court erred in sustaining the plaintiff's motion to strike and for a decree pro confesso.

(8) The Court erred in entering a decree against these defendants.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for said defendant.

Service of a copy of the foregoing assignment of errors is hereby acknowledged this 27th day of September 1937.

GEORGE B. SPRINGSTON,
Attorney for Plaintiff.

The suit in respect of the asserted cause of action affecting these defendants is, in essence, one against the Government of the Philippine Islands, which has not consented to be sued herein.

3. The Government of the Philippine Islands is an indispensable party to this suit, one whose interests are involved and vitally affected by this suit, and in whose absence the Court ought not to proceed.

4. The amended bill of complaint states no cause of action against these defendants or any of them cognizable in equity and sets forth no facts warranting the relief sought against them or any of them.

5. The plaintiff is not entitled to any recovery or relief against these defendants or any of them, since he consented to and acquiesced in the sale of the securities and voluntarily made the payment set forth in subparagraph 4 of paragraph 14 of the amended bill of complaint; by reason of which plaintiff is estopped from suing or recovering.

6. The plaintiff is not entitled to any recovery or relief against the defendants, because of the doctrine in pari delicto, potior est conditio defendentis.

7. The plaintiff is not entitled to any relief or recovery against defendant Harry H. Woodring because he is not properly a party hereto, there being no authority for his substitution as a party defendant in place of George H. Dern, deceased, since the statute under which substitution was granted does not apply to or cover a case such as that presented by the amended bill of complaint.

16. Answering paragraph numbered 16, defendants Harry H. Woodring and H. A. A. Smith admit that the funds and money referred to in paragraph numbered 12, to wit, the so-called Panama Canal funds, are not public funds and are not part of the revenue of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secre-
151 tary in respect of public moneys of the United States; but in this connection they aver that the interest accruing on said moneys is part of the revenues of the United States; and further that in respect of such of said moneys as were derived from the issuance of Postal Money Orders, they are funds for the payment of which the United States is responsible and obligated.

Said defendants deny that said moneys are not moneys of the Panama Canal, as alleged in said paragraph, and on the contrary aver that they are moneys of the said Panama Canal. These defendants admit that the Commercial National Bank was never designated by the Secretary of the Treasury as depository of the Government of the Canal Zone, but say that the Secretary of the Treasury did approve of the depositing in the said Commercial National Bank of moneys of the Panama Canal. Said defendants admit that the Secretary of the Treasury did not exact of the said Bank, the pledge of the securities given to insure the deposits of the Panama Canal funds but they aver that the Secretary of the Treasury was consulted by the Secretary of War in respect of the latter's proposal to require securities for said deposits and approved the same.

Defendant H. A. A. Smith is without knowledge or information concerning the other allegations of fact contained in said paragraph 16 and therefore denies them.

Defendants Harry H. Woodring, Creed Fulton Cox, and C. F. Brown, answering in respect of the moneys specified in paragraphs 14 and 15, to wit, the moneys involved in the transactions of the Government of the Philippine Islands, admit that said moneys are not moneys of the United States and are not subject to the control of the Secretary of the Treasury in his official capacity in respect of moneys of the United States; they aver, however, that said moneys are moneys of the Government of the Philippine Islands and that said moneys are deposited with the Secretary of the Treasury as moneys of the Government of the Philippine Islands pursuant to the Act of June 11, 1934, and are held in the Treasury of the United States to the credit and for the account of the Treasurer of the Philippine Islands and are claimed by said government as a part of its public moneys.

Said defendants admit that the said Commercial National
152 Bank was never designated by the Secretary of the Treasury to receive deposits of the Government of the Philippine Islands and that the Secretary of the Treasury never exacted from said bank the pledge of the securities to secure deposits of the Government of the Philippine Islands; but these defendants aver that the Comptroller of the Currency, a subordinate of the Secretary of the Treasury knew of said deposits made in said Bank by and on behalf of the Government of the Philippine Islands and that securities to insure the same had been exacted from said Bank and acquiesced in said transactions.

As to the other allegations of fact contained in said paragraph, defendant Harry H. Woodring, except as to the allegations respecting the Panama Canal funds, already answered, and defendants Creed Fulton Cox and C. F. Brown are without knowledge or information and, therefore, deny the same.

Wherefore, having made full answer, all these defendants pray that the said amended bill of complaint be dismissed as to them with costs against the plaintiff.

HARRY H. WOODRING,
Secretary of War.
By MALIN CRAIG,
Acting Secretary of War.
CREED FULTON COX,
Chief of Bureau of Insular Affairs,
War Department.
C. F. BROWN,
Disbursing Agent,
Philippine Revenue, Bureau of Insular Affairs,
War Department.
H. A. A. SMITH,
Chief of Office and General Purchasing Officer,
Panama Canal.
LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
E. M. CAFFEY,
Captain, Judge Advocate General's
Office, War Department,
Attorneys for Defendants.

DISTRICT OF COLUMBIA, *ss:*

Malin Craig, being first duly sworn, deposes and says that he is Acting Secretary of War of the United States, and as such has subscribed to the foregoing answer made on behalf of Harry H. Woodring, Secretary of War, one of the defendants in the above-entitled cause; that he has subscribed to said answer and makes this affidavit and verification on behalf of said defendant, because of the absence of the latter from the District of Columbia; that he has read the foregoing answer by him so subscribed and knows the contents thereof, and that the facts therein stated he verily believes to be true.

MALIN CRAIG.

Subscribed and sworn to before me this 30th day of October 1936.

[SEAL] HERBERT F. STATESIR,
Notary Public, D. C.

My commission expires Feb. 1, 1941.

153 DISTRICT OF COLUMBIA, *ss:*

Creed Fulton Cox, being first duly sworn, deposes and says that he is Chief of Bureau of Insular Affairs, War Department, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

CREED FULTON COX.

Subscribed and sworn to before me this 29th day of October 1936.

[SEAL] ALFRED H. MORI,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *ss:*

C. F. Brown, being first duly sworn, deposes and says that he is Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

C. F. BROWN.

Subscribed and sworn to before me this 29th day of October 1936.

[SEAL] ALFRED H. MORI,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *ss:*

H. A. A. Smith, being first duly sworn, deposes and says that he is Chief of Office and General Purchasing Officer, Panama Canal, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

H. A. A. SMITH.

Subscribed and sworn to before me this 29th day of October 1936.

[SEAL] FLOYD B. HEIMER,
Notary Public, D. C.

154 *Motion to strike paragraphs numbered 11 to 37 inclusive, and A to G inclusive, of the separate answers of the United States Shipping Board Merchant Fleet Corporation and for the entry of a decree pro confesso for plaintiff against said defendant, United States Shipping Board Merchant Fleet Corporation*

Filed December 28, 1936

* * * * * * *

Comes now Robert C. Baldwin, Receiver of the Commercial National Bank of Washington, plaintiff herein, by his attorneys, and moves the court to strike paragraphs 11 to 37, inclusive, and A. to G., inclusive of the separate answer of the United States Shipping Board Merchant Fleet Corporation and for the entry of a decree pro confesso for plaintiff against said defendant, United States Shipping Board Merchant Fleet Corporation, and for grounds therefor states:

1. The answer of the defendant, United States Shipping Board Merchant Fleet Corporation, does not set up any defense to the cause of action alleged in plaintiff's bill and plaintiff is entitled to have the paragraphs of said answer heretofore described stricken and is entitled to a decree pro confesso against defendant upon the allegations of plaintiff's bill.

155 2. The Pledge of the Commercial National Bank assets to secure deposits of the United States Shipping Board Merchant Fleet Corporation, or its predecessors in title, was unauthorized in law, ultra vires the bank, and void; such pledge constituted an illegal and preferential disposition of the bank's assets and the receiver may recover either the pledged securities or their proceeds.

3. And for the additional reasons and principles of law set forth in the attached memorandum of points and authorities in support of this motion.

To:

LESLIE C. GARNETT,
H. L. UNDERWOOD,
O. P. M. BROWN,
F. R. CONWAY,
Attorneys for United States Shipping Board Merchant Fleet Corporation.

Please take notice that the authorities intended to be used in support of the attached motion are appended hereto and the rules of this court require that if you oppose the granting of the above motion, you shall, within five (5) days from the time of the service of a copy of this motion upon you, file in reply with the Clerk of this court a

statement of the points and authorities upon which you rely and serve a copy upon counsel for the plaintiff.

SHERLEY, FAUST & WILSON,
H. B. WEAVER, JR.,
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
ROBERT C. BALDWIN,
Receiver.

Service of the above motion and points and authorities in support thereof acknowledged this 28th day of December, 1936.

156 LESLIE C. GARNETT,
U. S. Atty.
F. R. CONWAY,
Attorneys, United States Shipping Board Merchant Fleet Corporation.

157 *Motion to strike paragraph 10 and defenses numbered 1, 2, and 3 alleged in the separate answer of defendant, Inland Waterways Corporation, a corporation, and for the entry of a decree pro confesso for plaintiff against said defendant.*

Filed February 11 1937

* * * * * * *

Comes now Robert C. Baldwin, Receiver of the Commercial National Bank of Washington, plaintiff herein, by his attorneys, and moves the court to strike paragraph 10 and defenses numbered 1, 2, and 3 alleged in the separate answer of defendant, Inland Waterways Corporation, a corporation, and for the entry of a decree pro confesso for plaintiff against said defendant, Inland Waterways Corporation, and for grounds therefor states:

1. The answer of the defendant, Inland Waterways Corporation, does not set up any defense to the cause of action alleged in plaintiff's bill, and plaintiff is entitled to have the paragraph and defenses heretofore described stricken and is entitled to a decree pro confesso against said defendant upon the allegations of plaintiff's bill.

2. The pledge of the Commercial National Bank assets to secure deposits of the Inland Waterways Corporation, or its predecessors in title, was unauthorized in law, ultra vires the bank, and void; such pledge constituted an illegal and preferential disposition of the bank's assets and the receiver may recover either the pledged securities or their proceeds.

3. And for the additional reasons and principles of law set forth in the attached memorandum of points and authorities in support of this motion.

SHERLEY, FAUST AND WILSON,
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.

158 To:
LESLIE C. GARNETT,
H. L. UNDERWOOD,
LOYOLA M. COYNE,
Attorneys for Inland Waterways Corporation, a corporation.

Please take notice that the authorities intended to be used in support of the attached motion are appended hereto and the rules of this court require that if you oppose the granting of the above motion, you shall, within five (5) days from the time of the service of a copy of this motion upon you, file in reply with the Clerk of this court a statement of the points and authorities upon which you rely and serve a copy upon counsel for the plaintiff.

SHERLEY, FAUST & WILSON,
By CHARLES F. WILSON
GEORGE B. SPRINGSTON
Attorneys for Plaintiff.
ROBERT C. BALDWIN, *Receiver.*

159 *Motion to strike paragraph 12 and defenses numbered 2 and 3 alleged in the separate answer of defendants, George H. Dern, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, and for the entry of a decree pro confesso for plaintiff against said defendants*

Filed February 11, 1937

* * * * * * *

Comes now Robert C. Baldwin, Receiver of the Commercial National Bank of Washington, plaintiff herein, by his attorneys, and moves the court to strike paragraph 12 and defenses numbered 2 and 3 alleged in the separate answer of defendants, George H. Dern, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, and for the entry of a decree pro confesso for plaintiff against said defendants, and for grounds therefor states:

1. Said answer does not set up any defense to the cause of action alleged in plaintiff's bill, and plaintiff is entitled to have the paragraph and defenses heretofore described stricken and is entitled to a decree pro confesso against said defendants upon the allegations of plaintiff's bill.

2. The pledge of the Commercial National Bank's assets to secure deposits of the Government of the Canal Zone was unauthorized in law, ultra vires the bank and void; such pledge constituted an illegal and preferential disposition of the bank's assets and the receiver may recover either the pledged securities or their proceeds without restitution by payment in full of the credit balance on deposit in the bank at suspension.

3. And for the additional reasons and principles of law set forth in the attached memorandum of points and authorities in support of this motion.

SHERLEY, FAUST & WILSON,
By CHARLES F. WILSON
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
ROBERT C. BALDWIN, *Receiver.*

160 To:
LESLIE C. GARNETT,
H. L. UNDERWOOD,
H. A. A. SMITH,
Attorneys for George H. Dern, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal.

Please take notice that the authorities intended to be used in support of the attached motion are appended hereto and the rules of this court require that if you oppose the granting of the above motion, you shall, within five (5) days from the time of the service of a copy of this motion upon you, file in reply with the Clerk of this court a statement of the points and authorities upon which you rely and serve a copy upon counsel for the plaintiff.

SHERLEY, FAUST & WILSON,
By CHARLES F. WILSON.
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
ROBERT C. BALDWIN, *Receiver.*

161 *Suggestion of appointment of Cary A. Hardee as receiver*

Filed March 18 1937

* * * * * * * *

Comes now Cary A. Hardee, by his attorneys, and suggesting his appointment by the Comptroller of the Currency of the United States, pursuant to law, on March 1, 1937, as Receiver of Commercial National Bank of Washington, D. C., in the place and stead of Robert C. Baldwin, resigned, requests that he be substituted as plaintiff in the above entitled cause in the place and stead of said Robert C. Baldwin.

Sherley, Faust & Wilson,
By SHERLEY, FAUST & WILSON,
GEORGE B. SPRINGSTON,
Attorneys for plaintiff.

We consent:
LESLIE C. GARNETT,
DAVID A. PINE,
Attorneys for defendants.
Let this be granted:
F. DICKINSON LETTS, *Justice.*

Memorandum of court

Filed July 14 1937

* * * * * * * *

Motion to strike pars. 11 to 37 incl and A. to G incl of answer U. S. Shipping Board and for decree pro. con—sustained.

Motion to strike Par. 10 and defenses numbered 1, 2 and 3 of answer of Inland Water Ways and for entry of decree pro. con, sustained.

Motion to strike par. 12 and defenses 2 & 3 in answer of defts. Dern, Secy of War & H. A A Smith, Genl Pur. Officer & Chief of Washington Office Panama Canal, & for entry decree pro. con, sustained.

Clerk will please notify Counsel.

LUHRING, *J.*

162 *Order sustaining motion to strike paragraph 10 and defenses numbered 1, 2 and 3 alleged in the separate answer of defendant Inland Waterways Corporation, and for the entry of a decree pro confesso for plaintiff against said defendant, and granting a decree pro confesso and entering judgment for the plaintiff against the defendant Inland Waterways Corporation*

Filed August 23 1937

* * * * * * * *

This cause having come on for hearing at this term of Court upon the plaintiff's motion to strike paragraph 10 and defenses numbered 1, 2 and 3 alleged in the separate answer of defendant, Inland Waterways Corporation, a corporation, and for the entry of a decree pro confesso for plaintiff against said defendant, and it appearing to the satisfaction of the Court that said motion should be granted, it is

The Court this 18th day of August, A. D. 1937,

Adjudged, ordered and decreed, that the motion of plaintiff to strike paragraph 10 and defenses 1, 2 and 3 alleged in the separate answer of defendant, Inland Waterways Corporation, and for the entry of a decree pro confesso against said defendant be and the said motion is hereby granted; and, the said defendant, Inland Waterways Corporation, having elected to stand on its answer as filed and having stipulated that a final decree be entered at this time, it is further

Adjudged, ordered and decreed, that judgment be entered for the plaintiff against the defendant Inland Waterways Corporation for the sum of $506,215.63, with interest at the legal rate from

163 April 20, 1933, to April 25, 1933, as of which date a credit and offset in the sum of $21,804.16 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $484,411.47 will be subject to and will carry interest at the legal rate from April 25, 1933 to September 26, 1933, as of which date a credit and offset of 20% dividend on defendant's provable general claim in the sum of $482,656.57 amounting to $96,531.31 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $387,880.07 will be subject to and will carry interest at the legal rate from September 26, 1933 to November 13, 1933, on which date a credit and offset of 30% dividend on defendant's provable general claim in the sum of $482,656.57 amounting to $144,796.97 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $243,083.10 will be subject to and will carry interest at the legal rate from November 13, 1933 to February 24, 1936, on which date a credit and offset of 10% dividend on defendant's provable general claim in the sum of $482,656.57 amounting to $48,265.66 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $194,817.44 will be subject to and will carry interest at the legal rate from February 24, 1936 until paid; and it is further

Adjudged, ordered and decreed, that the defendant Inland Waterways Corporation is entitled to file a claim against the Receiver of the Commercial National Bank of Washington, D. C., and to receive such further dividends thereon as are paid to unsecured depositors and other general creditors of said bank, and it is further

Adjudged, ordered and decreed, that execution may issue against the defendant upon the judgment herein awarded.

O. R. LUHRING, *Justice.*

164 The defendant, by its attorneys, objects and excepts to the entry of the above order and decree of the Court, which objection and exception is hereby allowed by the Court, and an appeal is noted in open court to the United States Court of Appeals for the District of Columbia, which appeal is hereby allowed by the Court.

O. R. LUHRING, *Justice.*

No objection to the form. The defendant consents to the entry of a final decree herein in place of a decree pro confesso.

H. L. UNDERWOOD,
Assistant United States Attorney.

165 *Assignment of errors on behalf of Inland Waterways Corporation*

Filed September 1, 1937

(1) The Court erred in holding and determining that there was no authority for the pledging by the Commercial National Bank to this defendant of the securities involved to secure the deposits of the Inland Waterways Corporation in said bank and in not holding and determining that authority existed therefor.

(2) The Court erred in not holding and determining that the pledging of the securities was lawful and warranted by reason of custom and usage long established, well recognized and unchallenged for many years and sanctioned and approved by the Comptroller of the Currency and the Secretary of the Treasury.

(3) The Court erred in not holding and determining that the plaintiff is estopped to maintain this suit as against this defendant by the action of his predecessor Receiver in acquiescing in and agreeing to the sale by this defendant of a portion of the pledged securities and in purchasing from this defendant the other pledged securities; all with the consent and approval of the Comptroller of the Currency.

(4) The Court erred in not holding and determining that even if the pledge of the securities was illegal, nevertheless the plaintiff was not entitled to recover since the parties stand in pari delicto.

(5) The Court erred in not holding and determining that, assuming lack of authority for the giving of security, the deposits
166 of this defendant in the Commercial National Bank were held by the bank as a trustee ex malificio and that there could be no recovery; full satisfaction to defendant having heretofore been made by the Receiver.

(6) The Court erred in not holding and determining that plaintiff could not have relief from "a mistake of law."

(7) The Court erred in not holding that the plaintiff's claim against it is barred by laches.

(8) The Court erred in not holding and determining that the plaintiff has a full, complete and adequate remedy at law.

(9) The Court erred in not holding and determining that defendant's answer constitutes a good defense to the bill of complaint.

(10) The Court erred in granting the motion to strike and for a decree pro confesso against this defendant and in not denying said motion.

(11) The Court erred in entering a decree against this defendant.

LESLIE C. GARNETT,
United States Attorney.
H. L. UNDERWOOD,
Assistant United States Attorney.
Attorneys for defendant, Inland Waterways Corporation.

Service of a copy of the foregoing assignment of errors is hereby acknowledged this 1st day of September, 1937.

SHERLEY, FAUST & WILSON,
By CHARLES F. WILSON,
Attorney for Plaintiff.

167 *Order sustaining motion to strike paragraphs 11 to 37 inclusive, and A to G inclusive, of the separate answer of the United States Shipping Board Merchant Fleet Corporation and for the entry of a decree pro confesso for plaintiff against said defendant, and granting a decree pro confesso and entering judgment for the plaintiff against the defendant United States Shipping Board Merchant Fleet Corporation*

Filed September 24 1937.

* * * * * * *

This cause having come on for hearing at this term of Court upon the plaintiff's motion to strike paragraphs 11 to 37 inclusive, and A to G inclusive, of the separate answer of the United States Shipping Board Merchant Fleet Corporation, and for the entry of a decree pro confesso for plaintiff against said defendant, and it appearing to the satisfaction of the Court that said motion should be granted, it is by the Court this 24th day of September, A. D. 1937,

Adjudged, ordered and decreed, that the motion of plaintiff to strike paragraphs 11 to 37 inclusive, and A to G inclusive, of the separate answer of defendant, United States Shipping Board Merchant Fleet Corporation, and for the entry of a decree pro confesso against said defendant be and said motion is hereby granted; and, the said defendant, United States Shipping Board Merchant Fleet Corporation, having elected to stand on its answer as filed and having stipulated that a final decree be entered at this time, it is further

168 Adjudged, ordered and decreed, that judgment be entered for the plaintiff against the defendant United States Shipping Board Merchant Fleet Corporation, for the sum of $413,140.49, with interest at the legal rate from April 18, 1933 to April 27, 1933, as of which date a credit and offset in the sum of $4,270.17 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $408,870.32 will be subject to and will carry interest at the legal rate from April 27, 1933 to September 26, 1933, as of which date a credit and offset of 20% dividend on defendant's provable general claim in the sum of $409,297.28 amounting to $81,859.46 is hereby awarded and credited, and thereafter the balance of said judg-

ment amounting to $327,010.86 will be subject to and will carry interest at the legal rate from September 26, 1933 to November 13, 1933, on which date a credit and offset of 30% dividend on defendant's provable general claim in the sum of $409,297.28 amounting to $122,789.18 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $204,221.68 will be subject to and will carry interest at the legal rate from November 13, 1933 to February 24, 1936, on which date a credit and offset of 10% dividend on defendant's provable general claim in the sum of $409,297.28 amounting to $40,929.73 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $163,291.95 will be subject to and will carry interest at the legal rate from February 24, 1936 until paid; and it is further

Adjudged, ordered and decreed, that the defendant United States Shipping Board Merchant Fleet Corporation, is entitled to file a claim against the Receiver of the Commercial National Bank of Washington, D. C., and to receive such further dividends thereon as are paid to unsecured depositors and other general creditors of said bank; and it is further

Adjudged, ordered and decreed, that execution may issue against the defendant upon the judgment herein awarded.

O. R. LUHRING, *Justice.*

169 The defendant, United States Shipping Board Merchant Fleet Corporation, by its attorneys, objects and excepts to the entry of the above order and decree of the Court, which objection and exception is hereby allowed by the Court, and an appeal is noted in open court to the United States Court of Appeals for the District of Columbia, which appeal is hereby allowed by the Court.

O. R. LUHRING, *Justice.*

No objection to the form. The defendant consents to the entry of a final decree herein in place of a decree pro confesso.

H. L. UNDERWOOD,
Assistant United States Attorney.

F. R. Conway.
M. O. T.

170 *Order sustaining motion to strike paragraph 12 and defenses numbered 2 and 3 of the separate answer of defendants, Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, and for the entry of a decree pro confesso for plaintiff against said defendants, and granting a decree pro confesso and entering judgment for the plaintiff against the defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal*

Filed September 24, 1937

* * * * * * * *

This cause having come on for hearing at this term of Court upon the plaintiff's motion to strike paragraph 12 and defenses numbered 2 and 3 of the separate answer of defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer

and Chief of Washington Office of Panama Canal, and for the entry of a decree pro confesso for plaintiff against said defendants, and it appearing to the satisfaction of the Court that said motion should be granted, it is by the Court this 24th day of September, A. D. 1937,

Adjudged, ordered and decreed, that the motion of plaintiff to strike paragraph 12 and defenses numbered 2 and 3 of the separate answer of defendants Harry H. Woodring, Secretary of War,
171 and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, and for the entry of a decree pro confesso against said defendants be and the same is hereby granted; and, the said defendants, Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, having elected to stand on their answer as filed and having stipulated that a final decree be entered at this time, it is further

Adjudged, ordered and decreed, that judgment be entered for the plaintiff against the defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, for the sum of $368,327.71, with interest at the legal rate from September 1, 1937, until paid, representing the balance due plaintiff after crediting defendants with total dividends of 60% paid unsecured creditors of the Commercial National Bank of Washington, D. C.; and it is further.

Adjudged, ordered and decreed, that the defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, are entitled to file a claim against the Receiver of the Commercial National Bank of Washington, D. C., and to receive such further dividends thereon as are paid to unsecured depositors and other general creditors of said bank; and it is further

Adjudged, ordered and decreed, that execution may issue against the defendants upon the judgment herein awarded.

O. R. LUHRING, *Justice.*

172 The defendants, by their attorneys, object and except to the entry of the above order and decree of the Court, which objection and exception is hereby allowed by the Court, and an appeal is noted in open court to the United States Court of Appeals for the District of Columbia, which appeal is hereby allowed by the Court.

O. R. LUHRING, *Justice.*

No objection to the form. The defendants consent to the entry of a final decree herein in place of a decree pro confesso.

H. L. UNDERWOOD,
Assistant United States Attorney.

173 *Assignment of errors*

Filed September 27, 1937

* * * * * * *

The defendant, United States Shipping Board Merchant Fleet Corporation, assigns as errors in the findings, conclusions, rulings and decree of the court the following:

178 *Stipulation.*

Filed October 12, 1937.

* * * * * * *

It is hereby stipulated by and between the plaintiff and the defendants, Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, and Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, acting by their respective counsel herein, that the Consolidated Designation of Record hereto attached, may, in the interest of expedition and economy, be filed in lieu of and in substitution for the separate Designations of Record heretofore filed herein by these defendants.

SHERLEY, FAUST, AND WILSON,
By George B. Springston.
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.
LESLIE C. GARNETT,
United States Attorney,
Attorney for said defendants.

179 *Consolidated designation of record.*

The Clerk will please prepare the record on appeal of the defendants Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, and Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, including therein the following:

1. Amended bill of complaint, with all exhibits.
2. Separate answers of Inland Waterways Corporation and of United States Shipping Board Merchant Fleet Corporation with exhibits.
3. Separate stipulations that separate answer to original bill of complaint of defendant Inland Waterways Corporation and of United States Shipping Board Merchant Fleet Corporation may be taken and accepted as answer to amended bill.
4. Joint answer of Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, to amended bill of complaint.
5. Order substituting Carl A. Hardee, Receiver, as plaintiff in lieu of Robert C. Baldwin.
6. Order substituting Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, as parties defendant in lieu of George H. Dern, deceased, and Arthur L. Flint, deceased.

180 7. Plaintiff's separate motions to strike portions of answer of each of these defendants' and for decree pro confesso against each defendant.

8. Memorandum of the court sustaining plaintiffs' motions to strike and for decree pro confesso.
9. Separate final decrees against each of these defendants.
10. Notations of appeal of each of these defendants.

11. Separate assignment of errors of each of these defendants.
12. This designation.
13. Stipulation that this designation may be filed in the place of each of the separate designations heretofore filed.

LESLIE G. GARNETT,
United States Attorney.
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for Defendants:

Service of a copy hereof is hereby acknowledged this 12th day of October, 1937.

SHERLEY, FAUST AND WILSON,
By George B. Springston,
GEORGE B. SPRINGSTON,
Attorneys for Plaintiff.

181 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 180, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcrip, in cause No. 59008 in Equity, wherein Robert C. Baldwin, Receiver, Commercial National Bank of Washington, D. C., a corporation, is Plaintiff and Inland Waterways Corporation, a Corporation et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of October, 1937.

[SEAL] C. E. STEWART, *Clerk.*

[Endorsement on cover:] No. 7056. Inland Waterways Corporation et al., Appellants, vs. Hardee, Receiver. United States Court of Appeals for the District of Columbia. Filed Oct. 26, 1937. Moncure Burke, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Friday, May 13th, A. D. 1938

No. 7056

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, ET AL., APPELLANTS

vs.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION

The argument in the above entitled cause was commenced by Mr. Leslie C. Garnett, attorney for appellant, Secretary of War and Inland Waterways Corp., and was continued by Mr. F. R. Conway, attorney for appellant, Merchant Fleet Corp., and was continued by Mr. Swagar Sherley, attorney for appellee, and was concluded by Mr. George B. Springston, attorney for appellee. (Mr. Justice Stephens and Mr. Justice Edgerton not sitting.)

Opinion

United States Court of Appeals for the District of Columbia

No. 7056

INLAND WATERWAYS CORPORATION; UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION; HARRY H. WOODRING, SECRETARY OF WAR; ET AL., APPELLANTS

v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Decided October 31, 1938

Leslie C. Garnett, Special Assistant to the Attorney General, David A. Pine, United States Attorney, H. L. Underwood, Assistant United States Attorney, and F. R. Conway, all of Washington, D. C., for appellants.

George B. Springston, Swagar Sherley, Charles F. Wilson, Henry B. Weaver, and George P. Barse, all of Washington, D. C., for appellee.

124240—39——1

Before GRONER, C. J., and MILLER and MINSON, JJ.

GRONER, C. J.: This is a suit brought by the receiver of the insolvent Commercial National Bank of Washington City in behalf of its depositors, creditors, and stockholders against Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Secretary of War Woodring, and H. A. A. Smith, Purchasing Officer of the Panama Canal. The purpose of the bill is to recover what are claimed to have been preferential payments made by the bank to defendants.

In the case of Fleet Corporation, which we shall dispose of first, the bill alleges that the Corporation deposited various sums of money with the bank; that the bank unlawfully pledged part of its assets (United States Bonds) to the Corporation to secure the deposits; that the bank thereafter became insolvent; and that the receiver appointed to administer its assets, erroneously, and acting under mistake of law, acquiesced in the sale by the Corporation of some of the bonds and redeemed the remainder from the Corporation by paying the market value thereof. The prayer of the bill is that the Corporation be declared trustee for the benefit of the receiver of the sums paid to it and the sums realized by it from the sale and that the receiver have a decree for the amount thereof with interest.

No question is raised as to the form of the proceedings.

The Fleet Corporation answered, admitting the material facts and defending on the ground that the pledge was in all respects valid and lawful. The receiver made motions to strike certain parts of the answer and to enter a decree pro confesso. The trial court sustained the motions and decreed for the amounts claimed, subject to dividends of approximately 60% declared and paid to other creditors. This appeal followed.

Some, and perhaps the most important, of the questions argued here by counsel for the Corporation, were decided by us in O'Connor v. Rhodes, 79 F. 2d 146, 65 App. D. C. 21. That appeal involved the same facts as this and arose under the following circumstances: In August 1934 Thomas E. Rhodes, a depositor in the bank, instituted in the District Court a proceeding against the bank, Baldwin, then receiver, O'Connor, Comptroller, Fleet Corporation; Alien Property Custodian, and others, alleging, inter alia, substantially the facts we have outlined above and praying for restoration of the funds upon the ground that the payments had been preferentially made to the Corporation. The Comptroller and receiver moved to dismiss on the ground that the right to sue in this respect belonged primarily to the receiver and that the plaintiff had no capacity to maintain the suit in the absence of a showing that the receiver had refused to sue. The Corporation and the Custodian moved to dismiss on the same ground, but also on the ground that the Comptroller had authority to exact the pledges and that the bank had authority to make them. We held, for reasons stated in the opinion, that the suit by Rhodes was maintainable and that the bank was without power to pledge its

assets to secure the deposits of the Corporation or the Custodian. On motion for reargument it was shown that the receiver, at the direction of the Comptroller, had reversed his previous attitude as to the validity of the pledge and had himself brought a suit in all respects similar to the Rhodes suit. In these circumstances we modified our opinion to the extent of holding that the lower court might in its discretion stay the Rhodes suit and permit the receiver to prosecute his suit.

The Comptroller and receiver, as well as the Corporation and Custodian, applied to the Supreme Court for certiorari. The petition of the Comptroller and receiver was granted, limited to the question of the right of the depositor, Rhodes, to bring the suit. In view of our disposition of the motion for reargument, which did not foreclose action by the receiver, the Supreme Court affirmed without expressing an opinion on the merits of the case. 297 U. S. 383.

Thereafter the trial court entered a stay order in the Rhodes case, and the present suit was brought to its conclusion in the trial court.

An understanding of the grounds which the Corporation argues on this appeal requires knowledge of the status of the Corporation, which at the time in question was as follows: By the Shipping Act of 1916 (46 U. S. C. A. 801, et seq.) Congress established the United States Shipping Board and gave it the power (Sec. 810) to create a corporation under the District of Columbia laws for the purchase, construction, and operation of merchant vessels in the commerce of the United States. The Board created the Corporation, capitalized at 50 million dollars, and the United States purchased all the stock. Thereafter the Corporation operated in the same manner as a private corporation created for similar purposes would have operated. It could be sued in the State or Federal courts as other corporations. Skinner & Eddy Corp. v. McCarl, 275 U. S. 1. Its employees were not agents of the United States subject to the provisions of Section 41 of the Criminal Code. United States v. Strang, 254 U. S. 491. It was suable for its torts, Panama Railroad v. Curran, 256 F. 768, and was liable for breach of contract. Skinner & Eddy Corp. v. McCarl, supra. In the latter case the Supreme Court, in describing its activities, said that one of the reasons for its incorporation was to enable it to conduct its operations with the freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States. And in Sloan Shipyards Corp. v. U. S. Fleet Corporation, 258 U. S. 549, the Supreme Court said that the fact that it was formed under the laws of the District of Columbia was persuasive that it was expected to contract and to stand suit in its own person. The activities of the Corporation were changed by the Act of 1920 known as the Merchant Marine Act (46 U. S. C. A. 861, et seq.). By that Act Congress authorized the Shipping Board to take over the property held by the Corporation in its own name. This was accomplished by a deed of April 16, 1923. After that date the Corporation was utilized by the Shipping Board as an operating agency to complete projects begun by the

Board and to liquidate certain other phases of the Board's activities. In February 1927 (44 Stat. 1083) Congress changed the name of the Corporation to United States Shipping Board Merchant Fleet Corporation, but made no change in its status.

The deposits which the Corporation made and which the bank secured by pledge of its assets represented: First, funds received by the Fleet Corporation in the ordinary course of its business, the disbursement of which was in the control of the proper officers of the Corporation for corporate purposes. Second, as agent for the Board the Corporation would offer for sale vessels which the United States owned and would receive bids from prospective purchasers. The bidders would be required to pay in advance a certain sum as earnest money. This the Corporation would deposit in an account designated—United States Shipping Board Merchant Fleet Corporation, Agent, Good Faith Deposit Account. When the sale was consummated, the unsuccessful bidders would receive back their earnest payments. The money paid by the successful bidder presumably would go into the regular Corporation agency account, designated—U. S. S. B. M. F. Corp., Agent, Deposit Acc't. It was these accounts which the bank secured by a pledge of its assets, and the question for decision is whether under the facts we have outlined the receiver is entitled to a judgment against the Corporation for the amount of the preference it received (less, of course, an amount proportionate to the dividends which had been paid to other depositors).

On this appeal the Corporation argues four points:

1st, that the deposits were of public money and since the pledge was in substantial conformity to R. S. 3153 (12 U. S. C. A. 90), it was valid;

2d, that if the pledge was invalid the deposits, being public money, were received by the bank in violation of R. S. 5497 (18 U. S. C. A. 182), as the result of which the bank became trustee ex maleficio thereof;

3d, that no recovery can be had against the Corporation because the proceeds of the pledged securities have been deposited in the United States Treasury; and

4th, that the trial court was without jurisdiction because the suit in substance is a suit against the United States.

We shall dispose of these arguments in order.

First. In the circumstances we have narrated we think it clearly appears that the two deposit accounts which stood in the name of the Corporation as agent contained money of the United States. That portion derived from the sale of vessels owned by the United States was obviously the Government's money. The earnest money collected from bidders did not, of course, belong to the United States. The greater part of it was destined to be returned to those whose bids were rejected. But even as to it we think that the custody of the agent was in a sense the custody of the United States. Our opinion in Richmond, F. & P. R. Co. v. McCarl, 62 F. 2d 203, 61 App. D. C. 290, seems to us controlling in this respect.

But the contention of the Corporation does not prevail simply because the money which it received and deposited as agent of the Shipping Board was money of the United States. The question is whether it was the "public moneys" of the United States of the kind Congress had reference to in the statute upon which the Corporation relies in this case. That statute (R. S. 5153, 12 U. S. C. A. 90) authorizes the Secretary of the Treasury to designate a national bank as a depositary of public money and to require such bank to give satisfactory security for its safekeeping and prompt payment. The opinions of the Supreme Court in Texas & Pacific Ry. v. Pottorff, 291 U. S. 245, and Marion v. Sneeden, 291 U. S. 262, established definitely two propositions, which in our view are conclusive on this point. The first is that a national bank has no authority to pledge its assets to secure deposits otherwise than as Congress has expressly provided. The second is that R. S. 5153 has limited application to deposits made by the Secretary of the Treasury and cannot be extended to cover all public funds of every sort which may be deposited in a national bank by someone who holds the funds on behalf of the United States.

The Corporation in this case was not the agent of the Secretary of the Treasury. The deposits made were not made by the Secretary, and the Secretary had no control of these funds until they were covered into the Treasury. For these reasons we adhere to our decision in O'Connor v. Rhodes, supra. There we said that there is nothing in R. S. 5153 to authorize the taking of a pledge by the Corporation acting independently of the Secretary of the Treasury; that there was nothing to show that the deposits were made by direction of the Secretary but everything to the contrary; that there was nothing to show that the depositary bank was designated by the Secretary, but on the contrary that it was definitely proved that the pledge was taken by the Fleet Corporation on its own account.

Since it is not suggested, nor can be, that any other statute supports what was done in this case, we conclude that the pledge of assets by the bank was illegal and void. In this view it is unnecessary to consider those cases holding that, where a pledge is authorized by a statute, substantial compliance with the terms of the statute is sufficient.

Second: What we have said above largely disposes of the contention that if the pledge was invalid the deposits, being of public money, were received by the bank in violation of R. S. 5497 (18 U. S. C. A. 182),[1] as the result of which the bank became trustee ex male-

[1] Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both. (R. S. Sec. 5497; Mar. 4, 1909, c. 321, Sec. 96, 35 Stat. 1103.)

ficio. The statute makes it a criminal offense for any bank not an authorized depositary of public moneys to receive knowingly from any disbursing officer or collector of internal revenue or other agent of the United States any public money on deposit. We think it clear that the purpose of Congress in the enactment of this statute was to make sure that officers of the United States who received their moneys should not deposit them in any other place than a designated Government depositary from which the United States had exacted security. That statute would apply here if it was unlawful for the Corporation to deposit funds collected by it in any other depositary than a bank designated by the Secretary of the Treasury, but it is perfectly clear that there was no restriction, express or implied, upon the power of the Corporation to deposit funds which came into its possession in any depositary which it might select. This seems to us implicit in the language of the Supreme Court in the Skinner & Eddy case, as follows:

"At no time, during the War, or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the Government or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General. The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during Federal Control, have been audited, and the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of administration. Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States * * *.

* * * * * * *

"For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board * * *."

Since its creation, and even after it was divested of title to assets formerly held by it, the Corporation has exercised this control of its financial affairs free from the supervision and control of the Secretary of the Treasury. From its creation to the present time it has, with the knowledge and consent of Congress and of the Executive Departments of Government, conducted its financial affairs in all respects as a private corporation. Its bank deposits have never been considered subject to the rules and regulations applicable to deposits of public money, and this is illustrated in the regulations of the Reserve

Board effective October 31, 1930, providing that the term "Government Deposit" shall not apply to deposits of the Fleet Corporation. Under these circumstances we think the accounts involved in this case must be treated just as the accounts of any other depositor would be treated.

Counsel for the Corporation rely upon cases like Allen v. United States, 285 F. 678. There a postal official had deposited postal funds in a Massachusetts bank, and the bank had failed. The Court of Appeals held that the United States could recover the amount of the deposit from the bank as trustee ex maleficio. The theory was that, since the postal funds were public money, the postmaster had no authority to make the deposit and that the bank was prohibited by law from receiving it. The distinction between that case and this is clear. In the Allen case the postmaster had no statutory authority to deposit postal money in the particular bank because there was a Government treasurer in Boston designated to receive the money (39 U. S. C. A. 47), and he likewise had no authority because the bank was not an authorized depositary (39 U. S. C. A. 46; and see 31 U. S. C. A. 521). In these circumstances the bank, in receiving the funds, took them in violation of that statute on which the Corporation relies in this branch of the case (18 U. S. C. A. 182). The Allen case, therefore, presented the situation of a bank's receiving a deposit which it was prohibited by law from receiving from a person prohibited by law from making it. No such situation is present here. There was no provision, either in law or custom, against the Corporation's depositing in any bank it chose the funds which came into its possession; and there was equally no prohibition against the bank's receiving such deposit any more than in the case of the deposit of a private corporation. It is true the Corporation designated its accounts as agent accounts and presumably the bank knew it was receiving money of the United States for deposit, but we think that the deposits of public money which a bank is prohibited from receiving under 18 U. S. C. A. 182 are the same and only the same as those which the bank would be authorized to secure by pledge of its assets under 12 U. S. C. A. 90. The deposits of the Corporation, as we have seen, violated no Federal statute. In this view the bank cannot be held to any liability as trustee ex maleficio for the deposits it received.

Third. The answer of the Corporation shows that after it received the proceeds of the pledged securities it covered the money thus realized into the Treasury and is now without power or right to restore it. It insists that this bars a right of recovery against it. But we think the fact that the Corporation has transferred the fund to the United States does not relieve the Corporation of liability. As the Supreme Court said in Sloan Shipyards Corp. v. U. S. Fleet Corporation, supra, "The transfer of the property of the Fleet Corporation to the Shipping Board by the Act of June 5, 1920, c. 250, Sec. 4, 41 Stat. 988, 990, may affect the value of the remedy afforded by the present suit but not the jurisdiction of the Court." In other words, a

plaintiff may have a judgment notwithstanding the defendant is execution proof.

The question, as we think, does not depend upon the ability of the receiver to trace the funds which the Corporation received from the assets of the bank, but is controlled by the rule that one who participates in a breach of trust may be required either to account for the proceeds or respond in damages. Bank of Giles County v. Fidelity & Deposit Co., 84 F. 2d 321. In this case the Corporation deposited funds under its control in a national bank and received from the bank security for the safe return thereof. The pledge was unlawful, and it is of no moment that the bank may have been solvent when the pledge was given, for the pledge became effective only upon insolvency and at that instant became substantially a preferential transfer prohibited by R. S. 5242 (12 U. S. C. A. 91).

When the Corporation demanded and received and used the pledged security and refused to return it after the bank's insolvency, a conversion of trust property ensued. F. & M. State Bank v. Con. School District, 174 Minn. 286, 219 N. W. 163, 65 A. L. R. 1407. There the bank pledged commercial paper with the treasurer of a school district to secure a deposit of school funds, and upon the insolvency of the bank the Commissioner of Banking demanded return of the paper. The Minnesota Court held—just as the Supreme Court held in the Pottorff case—that the absence of statutory authority to pledge assets to secure deposits deprived the bank of any power to do the act; and the court thought the pledge was not only ultra vires and invalid but substantially a fraud upon other depositors whose right it was to share ratably in the assets of the bank upon liquidation; and that, because the refusal to return the pledge was a conversion, the Commissioner of Banks was entitled to maintain an action of trover.

And so we are of opinion that the pledge in question here was a preferential conversion of the bank's assets, and we think the receiver may maintain a suit to recover the pledged securities or, where they have been transferred, is entitled to a decree for their value; and in this respect we think it is no defense to the wrongdoers to say that the securities were sold and the proceeds turned over to the United States. An agent is not excused from liability for his torts because he acted only as agent, whoever his principal may be. The Corporation knew of the insolvency of the bank when under the terms of its pledge it converted the security to its own use, and it cannot escape liability by saying that it acted in this instance for principals who happen to be the United States. While the law is that an agent who receives money on behalf of his principal, to which his principal is not entitled, is not liable where without knowledge of the mistake he pays the money to his principal, the rule has no application here for the reason that the Corporation was charged with knowledge of the invalidity of the pledge when it received and converted it. At best the position of the Corporation is that it paid over the money on

the mistaken assumption of law that the United States were entitled to it. But that is not enough. When an agent does some act which his principal did not or court not authorize, he acts on his own responsibility. No valid authority could have been given the Corporation to exact an illegal pledge; since it did exact such a pledge, it is answerable for its tort without regard to the status of its principals. I Mechem on Agency, sec. 1456; Hirning v. Federal Reserve Bank, 52 F. 2d 382; Vann v. Federal Reserve Bank, 47 F. 2d 786.

Fourth. We think there is no substance to the contention that this is a suit against the United States. In the Rhodes case we denied a similar contention on behalf of the Alien Property Custodian. There is greater reason for denying it in the case of the Corporation for, notwithstanding the deposits consisted of moneys belonging to or in which the United States were interested, the contract itself was the contract of the Corporation; and the fact that Corporation may not now possess any money or nor be able to respond to a money decree against it may, as the Supreme Court said in the Sloan Shipyards case, affect the value of the remedy but not defeat the remedy itself. The receiver is not suing the United States but the Corporation. If its act constituted a tort, as we think it did, the Corporation must respond. See Merchant Fleet Corp. v. Harwood, 281 U. S. 519.

THE SUIT AGAINST THE CANAL ZONE

The bill of complaint joins the Secretary of War and the Purchasing Officer of the Panama Canal, and the facts as to the pledge by the bank to secure Canal Zone funds are in all respects like those of the pledge in the Fleet Corporation case. Money order funds of the Canal Zone were deposited in the bank and, it is claimed, illegally secured by a pledge of bonds made in 1910, to the Secretary of War. When insolvency came, the receiver of the bank mistakenly consented to a conversion of the pledged assets. There is this difference in the two cases—in the Fleet Corporation case it is claimed the money deposited in the bank was money of the United States, whereas in the instant case it is neither alleged nor argued that the deposit is the money of the United States.

The bill alleges that the consent of the receiver (appellee) to the taking over of the pledged assets was given under a mistake of law; that the defendants (appellants) held the same in trust; and the prayer is that the court decree that the excess which appellants receiver over other general creditors be returned to the receiver. The answer, challenges the right of recovery on the following grounds: (1) that authority for the pledge existed—if not directly then by custom and usage; (2) that the receiver is estopped by his conduct to demand recovery; and (3) that the United States are indispensable parties to the suit. The trial court on motion struck out the defenses, and upon appellants' election to stand upon their answer, final decree was entered for the sum of $368,327.71, with

interest, which was the difference between the value of the pledged assets and the dividend which appellants were entitled to receive as general and unsecured creditors of the bank.

First. What has been said in the Fleet Corporation case need not be repeated here. In O'Connor v. Rhodes, supra, following Texas & Pacific Ry. v. Pottorff, supra, and Marion v. Sneeden, supra, we held that R. S. 5153 (12 U. S. C. A. 90) is personal to the Secretary of the Treasury and grants no authority to a national bank to secure deposits of public money by public officers generally. It is necessary here, therefore, that appellants establish their claim of right to demand security, for without such authority the pledges were void and unlawful.

This brings us, then, to a statement of the facts necessary to an understanding of the case. By the Act of June 28, 1902 (32 Stat. 481), Congress authorized the acquisition of the Panama Canal Zone and provided for the establishment of a commission composed of seven members to co-operate with the President in the construction of the canal and the supervision and government of the Zone. By Act of April 28, 1904 (33 Stat. 429), Congress provided that "all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the Government of the Canal Zone" should be vested in such person or persons as the President should direct. Pursuant to this authorization the President appointed a commission—subject to the control of the Secretary of War. The Secretary of War on June 24, 1904, directed the chairman of the commission to formulate a plan for "a practical and efficient postal service in said Canal Zone, and including such measures and provisions of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone." The Commission inaugurated a postal service for the Zone September 2, 1904. At that time there was no postal savings system in the United States. Provision for it and for securing deposits of postal savings funds was first made by Act of June 25, 1910, and was confined to continental United States, Alaska, and Puerto Rico (39 U. S. C. A. 759). A year later the President by executive order (September 8, 1911) established a postal deposit money order system for the Canal Zone. The order created a board of trustees consisting of the Collector of Revenue, the Auditor, and the Treasurer of the Canal Zone to supervise and administer it. The board thus constituted was given power "to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices." It is significant in this respect that the act creating the United States postal savings system directed and required the board of trustees provided for therein to take security from banks in which the postal saving funds were deposited, whereas in the executive order creating the Canal system and in the Act which authorized it there was no similar requirement. The board was left

free to make rules and regulations for the general conduct of the system. So far as appears, no regulation requiring banks to give security for deposits was ever made. The executive order itself designated the Treasury of the Zone as depository or custodian of the funds.

By Act of August 24, 1912 (37 Stat. 560), Congress validated generally all orders, rules, and regulations promulgated in the Canal Zone by authority of the President. But since there was not then an order or rule authorizing the securing of deposits, the ratifying statute was wholly ineffective to confer the authority claimed by appellants here.

By Executive order of September 5, 1914, effective October 1, 1914, the then existing Postal Savings System of the Canal Zone was terminated, and the order provided that thereafter "For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged." In accordance with this order deposit money orders were issued, and Congress in 1916 (39 Stat. 528) provided that such orders should bear interest at a rate not exceeding 2 per cent and also "that the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders. * * *" This Act was a recognition and approval by Congress of the Executive order providing local machinery for the issuing of money orders. And it would appear also to constitute recognition and approval of the depositing of money-order funds under regulations. But the difficulty is that, so far as we can discover or have been advised, there were no regulations in this respect in existence.

Appellants next rely upon a regulation promulgated in 1923 and known as "Governor's Circular No. 660–61", as follows:

"Postal savings, money orders, clubhouse and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor. Tolls and other revenues of the United States shall be deposited to the credit of the Treasurer of the United States in accordance with laws and regulations prescribed therefor, and any funds due the Panama Railroad Company in excess of currency transferred to the Paymaster shall be deposited to the credit of the Panama Railroad Company in local depositories. * * *"

They insist that the circular was merely a recognition of what had been the former practice, which they claim had been ratified by the 1912 Act of Congress. We think the answer to their contention is first, that the circular was promulgated about seven years after the passage of the Act (Act of 1916) which, as we have pointed out, was itself some three or four years after the formerly existing system had been abolished; and, second, that neither at the time of the pas-

sage of the Act nor at any time prior thereto was there any Executive order, rule, or regulation effective in the Zone, or any Act of Congress, general or local, authorizing the Secretary of War to require bank security, or any Act of Congress specifically authorizing national banks to provide it. Nor was there such rule or regulation in effect at the time the circular was issued. And, finally, there was no authority of law then or thereafter whereby the Governor any more than the Secretary of War could make valid a pledge which the bank could not validly make. Hence, we think the most the prior approving Acts of Congress (Act of 1912–Act of 1916) professed to do, was to give recognition to such practices as had prior thereto been authorized by regulations promulgated by the President. And, as we have seen, no regulation authorizing the taking of a pledge to secure the deposits was ever so made. Congress has not at any time either directly or indirectly said that banks receiving Canal Zone postal funds shall give security for their safe return. And this specific authorization, the Supreme Court has held, is a condition precedent to the validity of a pledge.

It is next insisted that the later Act of February 16, 1933 (47 Stat. 812, 48 U. S. C. A. 1323a), which we quote,[2] is in effect a ratification of the action and policy of the Secretary of War in requiring the security. The Act provides that the postal service of the Canal Zone shall be governed by such laws and rules and regulations of the United States service as are not inapplicable to conditions existing in the Canal Zone. The Act authorizes the Governor to make rules and regulations necessary for the operation of the service. Presumably this authority was to be exercised to conform the local to the continental system in those respects in which it was considered that uniformity was desirable. If it be conceded that this included the right to make regulations to secure deposits of postal funds in conformity to the American system, it admittedly was not done. If it be likewise conceded that it included the right to demand security by "rule or regulation," admittedly also this was not done. The American system provided for a board of trustees, consisting of the Postmaster General, the Secretary of War, and the Attorney General, to deposit postal savings funds in solvent banks and to require security. 39 U. S. C. A. 751, 759. But neither when the Act was passed nor at any subsequent time was there a similar board in office under the Canal system. Nor at any time thereafter did the Governor make an rule or regulation requiring funds to be deposited in banks or any rule or regulation authorizing or requiring exaction of a pledge as security. In this state of the record it seems clear that

[2] The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

the action of the Secretary of War in 1910 in requiring the pledge was unauthorized, because it was unsupported by any statute, rule, or regulation then or thereafter in effect.

This brings us, then, to the question of whether the practice shown to have existed in this case created a custom or usage which legalized the pledge. The answer must be in the negative. While the pledge was made and taken in good faith, it violated the provisions of the National Bank Act designed to secure uniformity in the treatment of depositors. Texas & Pacific Ry. v. Pottorff, supra. Since the bank was without power to pledge its assets to secure deposits, the pledge was absolutely invalid, and the length of time of the pledge and the good faith of the transaction cannot give it validity. City of Fort Worth v. McCamey, 93 F. 2d 964; Leonard v. Gage, et al., 94 F.2d 19. Nor can custom create a valid contract where the power to make it is nonexistent. Besides, no custom of national banks generally in relation to the pledge of assets to secure deposits is shown—certainly to no greater extent than was true in the Pottorff and Sneeden cases where a similar contention was denied.

Second. We do not think the receiver is estopped to maintain the suit because he agreed, at the instance of the Comptroller of the Currency, that the pledged securities should be taken over by the Secretary of War. The receiver is an officer of the United States, Ex Parte Chetwood, 165 U. S. 443, and estoppel does not lie against such an officer to recover money paid out under mistake of law. Texas & Pacific Ry. v. Pottorff, supra; O'Connor v. Rhodes, supra. The answer to this contention is well expressed in Hood v. Hardesty, Receiver, 94 F. 2d 26, where it was said in a similar case:

"On the second question, the position of defendant is that there was a voluntary payment of defendant's deposit under mistake of law, and that payment so made cannot be recovered. There are two answers to this; first, that the receiver of a national bank is an administrative officer of the United States and is not bound by the rule precluding the recovery of money voluntarily paid under mistake of law; second, that to permit the assets of the failed national bank to be thus applied in extinguishment of unsecured claims for deposits would contravene the federal statutes forbidding preferences to creditors and requiring the equal and ratable distribution of assets."

See also Leonard v. Gage, 94 F. 2d 19, 23, 24; Rusch v. Baer, 18 F. Supp. 732.

Third. We think the United States are not indispensable parties to this suit and that this is not a suit against the United States. The argument is that the loss which will result from the recovery of the bonds or the proceeds of the bonds will be the loss of the United States because of a moral obligation to repay the holders of deposits money orders, and that, in these circumstances the United States are indispensable parties and have not consented to be sued. In O'Connor v. Rhodes we said on this point in the case against the Alien Property Custodian that the suit could not be defeated on the

theory that it was one against the United States. We think this was right. If a suit were brought against the Alien Property Custodian for the recovery of seized property and the evidence showed that the Custodian has erroneously turned over the property to another person not entitled thereto, it would be no defense to say that a judgment against the Custodian would, because of a moral obligation, have to be satisfied ultimately by the United States. Cf. Becker Steel Company v. Cummings, 296 U. S. 74. We think the same reasoning applies here. The proceeds of the pledge sought to be recovered in this suit do not belong to the United States and have not been covered into the Treasury. Nor is there any law under which they can be so covered. The money which the Secretary of War has is money of the bank out of which all creditors are entitled to be paid ratably. In these circumstances it is of no consequence what the United States may or may not do about the deficiency in the Canal Zone postal funds, if one should exist. The question is rather, whether there was a valid authorization for the pledge. If there was not and the Secretary of War participated in a conversion of the bank's assets, he must restore the bonds or refund the proceeds from their sale. The pledged bonds or their proceeds are in the hands of the Secretary of War, and the rule which we think the cases cited lay down requires him now to respond to judgment just as any other person who had participated in a preferential transfer would be compelled to respond.

THE CASE OF INLAND WATERWAYS CORPORATION

The allegations of the bill as to Inland Waterways Corporation parallel in all respects the charges against Fleet Corporation and Canal Zone. The circumstances as to the pledges were the same in all three cases. The grounds of defense were likewise the same, including the ground stressed here that the Corporation is an instrumentality of Government created to carry out the purposes declared in the Transportation Act of 1920 (41 Stat. 456), that its assets are assets of the Government and its money public moneys, and that any decree against it would materially affect the United States. There is this additional ground—that the receiver's remedy, if he has any, is at law.

The trial court decreed against the Corporation for the value of the pledged assets, less the dividend paid to other creditors of the bank.

The status of the Inland Waterways Corporation is as follows: It was created by Act of Congress June 3, 1924 (43 Stat. 360, 49 U. S. C. A. 151, 156). Its capital stock was fixed at fifteen million dollars and was wholly subscribed and paid for by the United States. The purpose of its creation was to continue through a corporate organization the operation of the barge and towboat transportation system then conducted under the direction of the Secretary of War on

certain inland waterways of the country. The Act provides that, after the Corporation shall have been organized, it shall carry on the business of a common carrier of freight by water, conforming in all respects to the laws applicable to railway transportation, and the Interstate Commerce Commission is given authority to fix rates and, generally speaking, to exercise the same control exercised over common carriers by rail. It is provided the Corporation should be managed by a board of directors and such other officers and servants as should be necessary in the conduct of the business. It should have succession in its corporate name during its existence; could sue and be sued in its corporate name and adopt a corporate seal; make contracts; acquire, hold, and dispose of property; employ and pay officers and employees; and conduct the business of a common carrier by water and generally have such powers as are necessary to carry out the purposes of its creation. In short, it was created to function in all respects as a private corporation. In this state of the record we think the argument in favor of immunity is no more persuasive here than in the case of Fleet Corporation, and that, like Fleet Corporation, it is liable for its wrongful acts just as in the case of any private corporation. Sloan Shipyards Corp. v. U. S. Fleet Corporation, 258 U. S. 549; Skinner & Eddy v. McCarl, 275 U. S. 1; Merchant Fleet Corp. v. Harwood, 281 U. S. 519.

Since no useful purpose will be served in repeating what has been said in the other cases as to the invalidity of the pledge and the right of the receiver to demand and receive back the pledged security, the only other question left for discussion is whether the suit can be maintained in equity. We think it can. It is well established that one who participates in a breach of trust may be held liable in a court of equity to account for the trust property or its proceeds or to respond in damages. Bank of Giles County v. Fidelity & Deposit Co., 84 F. 2d 321, 324. The purpose of the bill is to recover the bonds for the benefit of the creditors of the bank, who are entitled to have them or their proceeds administered as a trust. The charge is that the Corporation illegally received the bonds and holds them or the proceeds thereof as trustee for the bank's creditors. The theory of this is that the bonds or their proceeds belong to the creditors; that they represent trust funds to the same extent as the other assets of the bank; that their transfer to the Corporation was illegal; and that a court of equity has power to impress the fund in the hands of the Corporation with a lien. Unquestionably, since—as we hold—the pledge was illegal, its effect was to create an unlawful preference. The suit is to set aside the preference and recover the proceeds, and the practice in like circumstances has been to sue in equity. An examination of the cases since the Pottorff case, in which similar pledges were held illegal, shows that in the great majority of them the proceeding was in equity, and in Webb v. American Surety Co., 88 F. 2d 171, Judge Hutcheson said on this question:

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"I think this suit is one essential in equity, requiring the equitable application of the principles of recoupment and set off and the granting of equitable relief."

And in another similar case Judge Parker said:

"Defendant . . . has received from the proceeds of the bonds improperly pledged, funds to which he is not legally entitled . . . It is well settled that in such a case a court of equity will direct restitution."

Hood *v.* Hardesty, 94 F. 2d 26, 29.

The result of declaring the pledge void is to insure a ratable distribution of the trust fund to the creditors of the bank. Considered in that view, and it appearing that the Corporation has money in its hands which in equity belongs to someone else, a court of equity has power to order it paid to the person entitled to it.

We are, therefore, of opinion in this case, as in the others, that the decision of the lower court is correct and should be, and is, affirmed.

Affirmed.

Monday, October 31st, A. D. 1938

No. 7056, October Term, 1938

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, ET AL., APPELLANTS

vs.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Groner, October 31, 1938.

The Clerk will please prepare the transcript of record in connection with the application of the Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, et al., to the Supreme Court of the United States for a writ of certiorari in the above-entitled case, and include in the same the following:

1. The printed record of the proceedings in the lower court as filed in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the court.

4. Judgment of the court.
5. This designation.
6. The Clerk's certificate.

ROBERT H. JACKSON,

Solicitor General, Counsel for Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, et al.

JANUARY 23, 1939.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 122, inclusive, constitute a true copy of the transcript of the record and proceedings of the said Court of Appeals as designated by counsel in the case of: Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, et al., Appellants, *vs.* Cary A. Hardee, Receiver of Commercial National Bank of Washington, D. C., a Corporation. No. 7056. October Term, 1938, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this Twenty-fourth day of January A. D. 1939.

[SEAL]

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed March 13, 1939

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1939



No. 629

In the Supreme Court of the United States

OCTOBER TERM, 1938

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, PETITIONERS

v.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

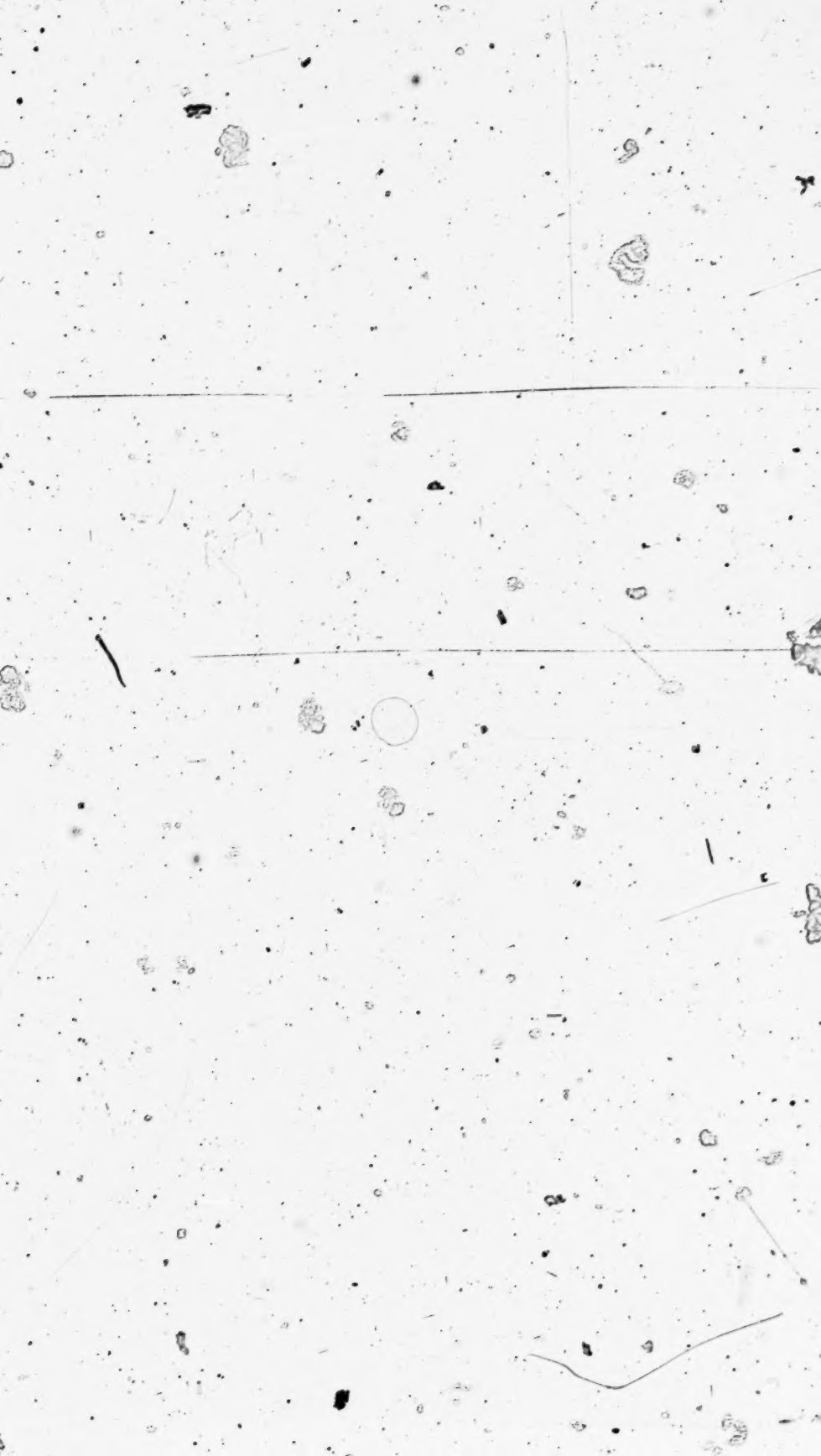
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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 629

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, PETITIONERS

v.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., a CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, and Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on October 31,

1938, which affirmed an order entered by the United States District Court for the District of Columbia striking parts of the petitioners' answers and entering a decree against them *pro confesso*.

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 97–98). The opinion of the Court of Appeals for the District of Columbia (R. 106) has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered October 31, 1938 (R. 121). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to various agreements with the Commercial National Bank providing for the securing of such deposits, deposits were made in the accounts of the Secretary of War, in behalf of the Canal Zone; the Inland Waterways Corporation; and the United States Shipping Board Merchant Fleet Corporation. After insolvency of the bank, the full amounts of these deposits with interest were paid to the depositors, either by turning over the security or from the proceeds of such security. The receiver, assailing the validity of the agreements

to give security, brought this suit to recover so much of the repayment of each deposit as exceeded the dividend paid general creditors. Two principal questions arise:

1. As to each petitioner, is the United States an indispensable party defendant?

2. As to each petitioner, under the circumstances of this case, was the giving of security by the national bank invalid?[1]

STATUTES INVOLVED

These are set out in Appendix A to the petition in *Woodring* v. *Wardell*, No. 628, this Term.

STATEMENT

At various times the Inland Waterways Corporation, the United States Shipping Board Merchant Fleet Corporation, and the Secretary of War entered into agreements with the Commercial National Bank of Washington, D. C., for the opening of deposit accounts and for the pledging by that bank of certain of its assets to secure the payment of the deposits so made. The bank suspended operations on February 27, 1933, and was found and determined to be insolvent by the Comptroller of

[1] If certiorari is granted, it is proposed also to submit arguments on the question whether, if the deposits were invalid, under R. S. Sec. 5497, the bank became a trustee *ex maleficio* of the funds here involved; and whether the court below had jurisdiction to entertain a suit in tort against the Inland Waterways Corporation.

the Currency, who, on February 28, 1933, appointed a receiver (R. 3).

At the time of the suspension of operations the credit balance of the Inland Waterways Corporation in the Savings Account was $271,113.05, and its balance in the Checking Account was $211,543.52 (R. 3). The funds involved were apparently derived either from moneys received from the operations of the corporation[2] or from moneys appropriated by Congress to meet deficits in its fund (R. 79). The par value of the securities pledged by the bank to the corporation at the time of suspension was $500,000 (R. 3). The receiver redeemed certain of the bonds for $245,000 cash, and the remaining securities were sold by the corporation and the amount in excess of the deposits was paid by the corporation to the receiver (R. 74–75).

On December 1, 1921, an account was opened under the name of the "United States Shipping Board Emergency Fleet Corporation, Agent Deposit Account" (R. 29–30). The name of this account subsequently was changed to "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account." The bank was advised that the Fleet Corporation was acting solely as agent for the United States Shipping Board and

[2] The corporation, with stock wholly owned by the United States, was created as an instrument for the execution of certain functions of the Secretary of War in promoting inland waterway transportation, Act of June 3, 1924, 43 Stat. 360, c. 98 (R. 76–79).

that it had no beneficial interest in the account (R. 30). The moneys which comprised this account were public moneys of the United States derived from the sale of government vessels, revenues from the operation of government vessels, rentals from real estate owned by the United States and miscellaneous revenues of the United States (R. 38). The funds in this account were withdrawn by checks of $50,000 and $100,000 and deposited with the Treasurer of the United States, where they became commingled with other funds of the United States (R. 38).

On January 14, 1926, another account was opened in the name of the "United States Shipping Board Merchant Fleet Corporation, Agent Good Faith Deposit Account" (R. 30). The funds in this account were wholly and exclusively derived from deposits made as security for performance of sales or purchase proposals. No checks were drawn on this account except to unsuccessful bidders for the return of their deposit or to the Treasurer of the United States when the bidder's deposit was forfeited or credited on the transaction (R. 39).

To secure these deposits, the Fleet Corporation, by agreement concluded with the bank, received certain pledged assets of the bank to insure the repayment of the deposits (R. 1). At the time the bank suspended business, the Fleet Corporation had on deposit $264,302.16 in the Agent Deposit Account and $144,995.12 in the Agent Good Faith

Deposit Account (R. 30). The receiver paid to the Fleet Corporation $281,695.31 to redeem certain securities, and the residue was sold by the Fleet Corporation, which retained the sum of $125,460.94 as principal and $5,515.49 as interest (R. 33–34).

The Secretary of War had on deposit with the bank an account guaranteed by pledged assets of the bank. At the time of the suspension of the bank the credit balance in the account was $711,622.92 (R. 6, 83). This was composed almost entirely of deposit money order funds and money order funds received by the Canal Zone postal service (R. 84). The par value of the pledged securities at that time was $791,000.00 (R. 6, 83). After the closing of the bank, the Secretary of War directed the General Purchasing Officer of the Panama Canal to take over the pledged bonds, to which the receiver acceded (R. 6–7, 83).

On June 4, 1936, the receiver brought suit in the District Court for the District of Columbia seeking to recover from the petitioners any amount in excess of that which they would have received through dividends paid to general creditors.[3] The petition-

[3] A suit involving many of the issues here presented was commenced by a depositor of the bank. It was considered by the court below in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, wherein it was held that assets pledged to the Fleet Corporation and to the Attorney General as Alien Property Custodian might be recovered. This Court granted certiorari, but limited the writ to the question of the right of a depositor to institute suit without prior demand being made to institute such suit on the receiver and the Comptroller of

ers filed separate answers. The receiver moved to strike out certain portions of those answers and for the entry of a decree *pro confesso* (R. 93–95). That motion was granted, and the decree was entered against the various petitioners (R. 97–98). On appeal the Court of Appeals for the District of Columbia affirmed.

SPECIFICATION OF ERRORS TO BE URGED[1]

The court below erred:

I.

IN RESPECT OF THE INLAND WATERWAYS CORPORATION

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation, which is an instrumentality of the United States created by an Act of Congress to perform functions formerly entrusted to the Secretary of War.

2. In holding that the Inland Waterways Corporation is subject to a suit in tort.

3. In failing to hold that the money in question was public money of the United States.

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the Currency. That right was affirmed. *O'Connor* v. *Rhodes*, 297 U. S. 383. On remand the District Court is holding the *Rhodes* case in abeyance pending the outcome of the present suit.

[1] The petitioners below contended that the bill of complaint was multifarious, and still believe such to be the case. Owing to the fact that the funds deposited by the three petitioners differed in certain aspects, we are specifying the errors separately in respect of each of them.

4. In failing to hold that the United States is an indispensable party to the suit.

5. In failing to hold that the bank became a trustee *ex maleficio* with respect to the funds here involved.

6. In affirming the judgment against the petitioners.

II

IN RESPECT OF THE UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION

7. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation, which is an instrumentality of the United States created by an Act of Congress to perform functions of a public character.

8. In failing to hold that the moneys in question were public moneys of the United States.

9. In failing to hold that the United States is an indispensable party to this suit.

10. In failing to hold that the bank became a trustee *ex maleficio* in respect to the funds here involved.

11. In affirming the judgment against the petitioners.

III

IN RESPECT OF HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH (CANAL ZONE DEPOSITS)

12. In holding that a national bank could not lawfully pledge its assets to secure a deposit account which was made up of moneys received from

deposit money order accounts and postal money order accounts of the Panama Canal.

13. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

14. In failing to hold that the laws applicable to postal money order accounts in the United States were applicable to the postal accounts of the Canal Zone.

15. In failing to hold that the moneys in question were public moneys of the United States.

16. In failing to hold that the United States is an indispensable party to this suit.

17. In failing to hold that the bank became a trustee *ex maleficio* in respect to the funds here involved.

18. In affirming the judgment apainst the petitioners.

REASONS FOR GRANTING THE WRIT

Pursuant to several agreements the Commercial National Bank arranged to secure the various funds in the deposit accounts of the Secretary of War, in behalf of the Canal Zone; the Inland Waterways Corporation; and the United States Shipping Board Merchant Fleet Corporation. After insolvency of the bank, the full amounts of these deposits with interest were recovered by the depositors out of the security or the proceeds of the sale thereof. The receiver, attack-

ing the validity of the agreements to give security, brought this suit to recover so much of the repayment of each deposit as exceeded the dividend paid general creditors.

The principal contentions of the petitioners are that in the circumstances of this case the giving of security by the national bank was valid, and that the District Court was without jurisdiction to entertain the suit since it is in effect one brought against the United States and in which the United States is an indispensable party defendant.[5]

In view of the complexity of the various accounts involved in this record, and for the sake of simplicity and clarity, we have set out the reasons for granting the writ of certiorari in the petition in the companion case of *Woodring et al.* v. *Wardell*, No. 628 (filed contemporaneously with the present petition), where only Canal Zone funds are involved. We respectfully refer the Court to the petition filed in that case for a statement of the reasons for granting the writ of certiorari in this case. In the present case it is again submitted, as to Secretary Woodring and the other petitioners, that the United States is an indispensable party defendant as the

[5] If certiorari is granted, it is proposed also to contend that if the deposits were invalid, under R. S. Sec. 5497, the bank became a trustee *ex maleficio*, so that the repayment of the funds did not constitute a preference; and that the District Court did not have jurisdiction to maintain a suit in tort against the Inland Waterways Corporation.

party primarily affected by the decision below,[6] and that, in the circumstances of this case, no invalidity attaches to the giving of security by the bank in accordance with the custom long settled with respect to governmental agencies and known to the officers of the Treasury Department, including the Comptroller of the Currency.[7] The widespread importance of the question to governmental agencies is indicated by the presence in this case of the petitioners other than the Canal Zone, and note may also be taken of the deposit of the Philippine Islands indicated in the pleading below (R. 9) and now awaiting trial.

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[6] As the court below noted, however, the position of the petitioning corporations is affected by the statutory provisions that they have the power to sue and be sued in their corporate name. However, the Inland Waterways Corporation is only a corporate aspect of the Secretary of War, its sole incorporator, and is under his management and control (R. 76–79). The corporation has no board of directors in the ordinary sense, but only a board to advise the Secretary of War and to make recommendations to him. Act of June 3, 1924, c. 243, 43 Stat. 360, Secs. 2; 4, as amended, 49 U. S. C., Secs. 152, 154. Moreover, this corporation was incorporated by an Act of Congress (Act of June 3, 1924, c. 243, Sec. 5, as amended, 49 U. S. C., Sec. 155), and the general provision giving it power to sue and be sued may not extend to an action for conversion, sounding in tort. See *Lyle* v. *National Home, etc.*, 170 Fed. 842 (C. C. E. D. Tenn.); see brief for respondent in *Keifer and Keifer* v. *Reconstruction Finance Corporation et al.*, No. 64, present Term, now pending on certiorari to review 97 F. (2d) 812 (C. C. A. 8th).

[7] The practice and knowledge thereof are alleged in the answers at R. 42, 75, 85.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JANUARY 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 6

In the Supreme Court of the United States

OCTOBER TERM, 1939

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, PETITIONERS

v.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 6

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, PETITIONERS

v.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The judgments of the District Court were entered without an opinion (R. 97–101). The opinion of the United States Court of Appeals for the District of Columbia (R. 106–121) is reported in 100 F. (2d) 678.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 31, 1938 (R. 121). The petition for a writ of certiorari was filed on January 31, 1939, and was granted on March 13, 1939 (R. 123). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to various agreements with the Commercial National Bank deposits, secured by pledged collateral, were made in the accounts of the Secretary of War in behalf of the Canal Zone, the Inland Waterways Corporation, and the United States Shipping Board Merchant Fleet Corporation. After insolvency of the bank, the full amounts of these deposits with interest were paid, either by turning over the security or from the proceeds of such security. The receiver, assailing the validity of the agreements to give security, brought this suit to recover so much of the repayment of each deposit as exceeded the dividend paid general creditors. Three questions arise:

1. As to the Canal Zone deposit, is the United States an indispensable party defendant?

2. As to each petitioner, was the giving of security by the national bank invalid in the circumstances of this case?

3. A third question, which we do not urge as ground for reversal, relates to the Merchant Fleet

Corporation and the Inland Waterways Corporation. Did the bank hold their deposits as trustee *ex maleficio,* did the receiver take the assets of the bank subject to those trusts, and may the respondent, in the circumstances of this case, recover a money judgment against the petitioners?

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the separately printed Appendix to Nos. 5 and 6.

STATEMENT

This case is before this Court upon the pleadings, consisting of an amended bill of complaint. (R. 1–28); separate answers filed by the several petitioners;[1] motions by the respondent to strike certain defenses and for the entry of decrees *pro confesso* against the petitioners (R. 93–96); the judgments of the District Court, granting the motions (R. 97–101); and the judgment of the court below, affirming these judgments (R. 121).

The facts may be summarized as follows:

A. INLAND WATERWAYS CORPORATION[2]

On July 18, 1930, the Inland Waterways Corporation, an instrumentality of the United States (R.

[1] United States Shipping Board Merchant Fleet Corporation (R. 29–31), including exhibits; Inland Waterways Corporation (R. 73–80); Harry H. Woodring *et al.* (R. 82–92).

[2] The several petitioners were made defendants in the same complaint; it is deemed advisable, for the purpose of clarity, separately to set forth the facts relating to each.

79) created by the Act of June 3, 1924, for the purpose of administering the inland, canal, and coastwise waterway system of the United States (R. 77), opened a savings deposit account in the Commercial National Bank of Washington, D. C., a national banking association (R. 2–3). On March 5, 1931, the Corporation opened a checking account in the same bank (R. 3).

The bank agreed to safeguard the deposits, with securities subject to the order and control of the Corporation (R. 74). This arrangement was approved and required by the Secretary of War (R. 75).

On February 27, 1933, the bank closed its doors and suspended its operations. It was found and determined to be insolvent by the Comptroller of the Currency, and thereafter, on February 28, 1933, a receiver, predecessor of the respondent, was appointed (R. 3). At the time of the closing of the bank the credit balance in the savings account was $271,113.05, and the credit balance in the checking account was $211,543.52. The par value of the collateral securing the deposits was at that time $500,000 (R. 3).

Thereafter, on April 7, 1933, bonds of the par value of $245,000 were replaced by respondent's predecessor with cash (R. 74–75). On April 20, 1933, with the consent of respondent's predecessor, and the sanction and approval of the Comptroller of the Currency (R. 75), the corporation sold the

residue of the collateral for $261,215.63, and, on April 25, 1933, turned over to the respondent the sum of $21,804.16 as an adjustment and refund (R. 4).

On June 4, 1936, the receiver of the Commercial National Bank brought suit against this petitioner, together with the other petitioners, to recover that part of the proceeds which represented an amount in excess of the distributive dividends paid to general creditors. The complaint asserted, in substance, that the pledge of the securities by the bank was illegal; that the redemption of a portion of the bonds by the respondent's predecessor was made under a mistake of law and was illegal; that the sale of the remaining bonds by the Corporation was illegal; that, therefore, the bond or the proceeds became charged with a trust for the benefit of its depositors, creditors, and stockholders (R. 1–4); that the funds were not moneys of the United States nor a part of the revenues of the United States, and had not been covered into the Treasury of the United States; and, finally, that the Commercial National Bank had never been designated by the Secretary of the Treasury as a depositary of moneys of the Corporation (R. 11).

The petitioner answered separately, denying the specific allegations, and averred, insofar as material here, that the acts of all of the parties involved were in accordance with, and authorized by, administrative practice and custom known to and ap-

proved and sanctioned by the Comptroller of the Currency. It further averred that the United States was an indispensable party defendant and that if the bank had no authority to pledge the securities, it received and held the deposits as trustee *ex maleficio* for the benefit of the petitioner (R. 73–80).

B. UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION

On August 18, 1917, the United States Shipping Board Emergency Fleet Corporation opened a deposit account in the Commercial National Bank of Washington, D. C., a national banking association (R. 4). This account was closed on August 5, 1918 (R. 30). On December 1, 1921, an account was again opened with the bank. On June 14, 1923, written notice was given to the bank by the Corporation, that it was acting solely as the agent of the United States Shipping Board, that it had no beneficial interest in the account, and that the designation of the account should be changed to "United States Shipping Board Emergency Fleet Corporation, Agent, Deposit Account." The caption was subsequently changed again, to "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account," to conform to the change in the petitioner's corporate name (R. 30). This account was opened pursuant to a resolution of the Board of Trustees of the petitioner, to the effect that in the interest of the United States, it was desirable to facilitate nego-

tiation of checks drawn on depositaries other than the Treasurer of the United States, and that therefore the treasurer of the petitioner was authorized to open an account with the bank, "a government depositary," the proceeds to be placed to the credit of the petitioner for immediate expenditure or transfer to the Treasury of the United States (R. 38).

On January 14, 1926, the petitioner opened another deposit account in the bank under the caption "United States Shipping Board Emergency Fleet Corporation, Agent, Good Faith Deposit Account" (R. 4, 30).

On November 19, 1931, the two parties entered into an agreement whereby the bank was to deliver to the corporation certain securities as collateral for the prompt payment on demand of all funds.[3] (R. 15–17). This agreement was the result of certain resolutions passed by the United States Shipping Board and the board of trustees of the corporation, reciting the statutory requirement that the Secretary of the Treasury should require all banks acting as financial agents of the Government to give satisfactory security for the safekeeping and prompt payment of public money deposited with them, and directing the treasurer of the corporation to require of each bank the deposit of securi-

[3] The letter from the bank, transmitting the securities (R. 70–71) authorized the corporation, on nonpayment of any of the deposits, to sell the securities, and to retain and apply the interest coupons. (See R. 15–17.)

ties as a condition for the continuance of deposits (R. 39–40).

At the time of the closing of the bank, on February 27, 1933, the credit balance in the "Agent, Deposit Account" was $264,302.16, and in the "Agent, Good Faith Deposit Account," $144,955.12 (R. 4, 30). The par value of the securities which had been pledged with the approval of the Comptroller (R. 16, 40, 41) was $400,000 (R. 5, 31).

On March 8, 1933, the treasurer of the corporation inquired of the Comptroller of the Currency whether the bonds might be liquidated (R. 31, 46–48). The Deputy Comptroller of the Currency, by letter dated March 17, 1933, authorized respondent's predecessor to advise the corporation that he, as receiver, would "interpose no objection to the sale of the securities," the proceeds to be applied in payment of the corporation's deposit claims.

Thereupon, the petitioner requested delivery of the bonds to the Treasurer of the United States for safekeeping and on April 4, 1933, the Treasury Department arranged for their disposal, and credited the proceeds of such disposal to the United States Treasury account of the petitioner's treasurer (R. 32, 50).

Certain bonds, of the par value of $275,000, were sold to respondent's predecessor for $281,695.31, paid to the corporation by him and deposited in the United States Treasury to the credit of the treas-

urer of the petitioner. The bonds were placed subject to the order of the Comptroller of the Currency for the benefit of the depositors of the bank. The remaining bonds were sold by the Federal Reserve Bank, the proceeds being deposited to the credit of the Treasurer of the United States for the account of the treasurer of the petitioner (R. 33–34, 55–57). Petitioner deposited with the Treasurer of the United States some matured interest coupons, and a check for the remainder of the matured coupons (R. 34, 57). All of these transactions were consummated with the express knowledge, consent, and approval of the respondent's predecessor and of the Comptroller of the Currency (R. 31, 34).

The sum of $4,270.17, representing the difference between the total proceeds of the disposal of the securities and the amounts on deposit in the bank, was paid by the petitioner to the respondent's predecessor on April 27, 1933 (R. 34, 57).

The complaint of respondent's predecessor (R. 5–6, 11) asserted the illegality of the pledge, and the right to recover so much of the proceeds as exceeded the distributive dividends paid to general creditors, in terms substantially similar to the allegations with respect to the Inland Waterways Corporation (*supra*, p. 5).

This petitioner answered separately, denying the specific allegations. It traced its history and outlined its statutory functions to show that it owned

no property, and controlled no money on deposit in any bank, except public funds appropriated by Congress, and funds received by the petitioner as public agent (R. 35–38; see discussion *infra*, pp. 49–50). By virtue of the Merchant Marine Act, 1920 (c. 250, 41 Stat. 988) petitioner, incorporated by the Shipping Board under the laws of the District of Columbia on April 16, 1917, was continued in existence for the purpose of the sale and operation of vessels owned by the United States, liquidation of Government property and the disbursement and collection of its public moneys. The moneys on deposit in the "Agent, Deposit Account" were wholly and exclusively public funds derived from the sale of Government vessels, revenues from the operation of Government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States which had come into the petitioner's custody as agent of the United States. Funds from this account were transferred from time to time from the bank to the Treasury of the United States, and there commingled with the public funds of the United States. The moneys on deposit in the "Agent, Good Faith Deposit Account" were wholly and exclusively suspense funds consisting of deposits for faithful performance of contracts and proposals by private bidders, and the only disbursements were in the form of returns of deposits to unsuccessful bidders, or as payments to

the Treasurer of the United States upon forfeiture of bidders' deposits or for crediting on the transaction for which the deposit was made. All such transfers, on information and belief, were received and accepted by the Treasurer of the United States as public funds of the United States [1] (R. 35–39).

The petitioner further averred that the pledge, known to, and approved by, the Department of the Treasury and by the Comptroller of the Currency, was in all respects legal (R. 42–43). It further alleged that all the proceeds of the sale of the bonds had been commingled with other public funds of the United States; that the petitioner possessed or controlled no property upon which a trust could be impressed; that the United States was an indispensable party to the suit, and that, if the bank had accepted the deposits without authority, it became a trustee *ex maleficio*, without title to any of the funds, so that the bonds were charged with the trust in favor of the respondent (R. 43–45).

C. THE SECRETARY OF WAR ET AL.

On May 1, 1911, the then Secretary of War opened a deposit savings account, carried under the caption "Government of Canal Zone," in the Commercial National Bank of Washington, D. C., a national banking association (R. 6). This account was opened pursuant to an agreement entered into

[1] In asking for a reduction of interest charges the bank referred to the petitioner's deposits as "public money deposits" (R. 68).

between the Secretary of War and the bank on May 11, 1910 (R. 17–21), whereby the bank deposited certain bonds with the General Purchasing Officer of the Isthmian Canal Commission, as security for the safekeeping and prompt payment of the moneys and funds deposited under the agreement. In the event of the bank's failure to carry out the agreement, the bonds were to become the property of the Secretary of War, subject to being retained or sold by him.[5]

On the date the bank closed, February 27, 1933, the balance in the account amounted to $711,622.92, composed almost entirely of money received by the Postal Service of the Canal Zone, consisting of deposit money-order funds and money-order funds (R. 84). The par value of the collateral deposited to secure the deposits was at that time $791,000.00 (R. 21).

On June 16, 1933, the Secretary of War directed the General Purchasing Officer of the Panama

[5] Other clauses of this contract recited that the Secretary of War acted as "the executive officer of the United States charged by the President with supervision and control over the governmental affairs of the Canal Zone," stated that the bank, in consideration of the benefits it would derive from the deposit, agreed to receive, keep safely, disburse, and account properly for all the moneys received; and provided that the contract should continue in force. In the event that Congress by law should "direct its termination or give instructions concerning the funds covered by this contract inconsistent with the terms hereof," the bank was to pay over immediately any balance remaining to the credit of the account.

Canal, pursuant to the provisions of the contract, to take over the bonds "as the absolute property of the Canal Zone," and authorized him to enter into an agreement with the receiver of the bank, subject to the approval of the Comptroller of the Currency, concerning the market value[6] at which the bonds were to be taken over (R. 7, 21–22). The receiver consented to the taking over of the bonds (R. 7).

The complaint of respondent's predecessor (R. 6–7, 11), in addition to the general facts contained in the foregoing statement, averred that the several defendants were being sued both in their individual and personal capacities (R. 3) and alleged the illegality of the pledge of securities by the bank and the right to recover that part of the bonds or, if they had been sold, of the proceeds of the sale, which represented an amount in excess of distributive dividends paid to general creditors, in terms substantially similar to the allegations with respect to the Inland Waterways Corporation (*supra*, p. 5).

The prayer for relief sought to compel the petitioners "as Secretary of War and as General Purchasing Officer and Chief of Washington Office,

[6]While the record is silent in this respect, the agreed market value was $690,223.75, as of June 15, 1933, leaving a balance due to the Canal Zone fund of $21,399.16. While these are matters which would have been developed had a trial on the merits been had, it is believed that this information might be of interest to the Court.

respectively," to account for the bonds or the proceeds of their sale (R. 13).

The petitioners in their answer averred that they were parties in their official capacities only, by substitution for their predecessors in office. Reviewing the statutes and regulations relating to the Canal Zone (R. 84–85), petitioners asserted that the making of the contract for the deposit and delivery of securities was within the lawful authority of the Secretary of War (R. 84); that the action of the Secretary in entering into the contract and receiving the securities was recommended and approved by the Secretary of the Treasury and the Comptroller of the Currency; and that it was in compliance with a practice and custom of twenty years' standing approved and sanctioned by the Comptroller of the Currency, and acquiesced in by Congress (R. 85–86, 90).

The petitioners further alleged that the United States was the real party in interest, and an indispensable party to the suit.

The respondent's motions to strike out certain parts of each answer and for the entry of a decree *pro confesso* against each defendant were granted, and judgments were entered against the petitioners (R. 97–98, 99–100, 100–101). On appeal, the Court of Appeals for the District of Columbia affirmed the judgments.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

In respect of the Inland Waterways Corporation

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation which is an instrumentality of the United States created by an Act of Congress to perform functions formerly entrusted to the Secretary of War.

2. In failing to hold that the money in question was public money of the United States.

3. In affirming the judgment against the petitioners.

In respect of the United States Shipping Board Merchant Fleet Corporation

4. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation which is an instrumentality of the United States created by an Act of Congress to perform functions of a public character.

5. In failing to hold that the moneys in question were public moneys of the United States.

6. In failing to hold that the bank became a trustee *ex maleficio* in respect of the funds here involved.

7. In affirming the judgment against the petitioners.

In respect of Harry H. Woodring, Secretary of War, and H. A. A. Smith (Canal Zone Deposits)

8. In holding that a national bank could not lawfully pledge its assets to secure a deposit account which was made up almost entirely of deposit money order accounts and postal money order accounts of the Panama Canal.

9. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

10. In failing to hold that the laws applicable to postal money order accounts in the United States were applicable to the postal accounts of the Canal Zone.

11. In failing to hold that the moneys in question were public moneys of the United States.

12. In failing to hold that the United States is an indispensable party to this suit.

13. In affirming the judgment against the petitioners.

SUMMARY OF ARGUMENT

I

Two cardinal factors demonstrate the validity of the pledges in the instant case: the pledges covered deposits made by government instrumentalities, and the pledges themselves were made by a government instrumentality, a national bank.

1. Historically, the taking of security for the deposit of governmental funds in ordinary banks was integrated into our fiscal policy. Deposits with the first and second bank of the United States caused the Government no loss. Between 1811 and 1817 deposits were made in private state banks without any provision for collateral security and heavy losses resulted. Deposits in similar banks between 1833 and 1837 likewise were disadvantageous to the Government. When Secretary Taney withdrew moneys from the Bank of United States in 1833 he deposited them in state banks under contracts calling for the giving of security. This provision was incorporated in an 1836 statute. In 1841, after the repeal of a year-old subtreasury act, the Secretary of the Treasury, without statutory direction, deposited governmental moneys in state banks under contracts calling for security. This continued until the subtreasury Act of 1846. Thus, in order to protect deposits of public funds, there gradually evolved a system requiring a pledge of assets by depository banks or the retention of all public moneys in subtreasuries.

2. National banks were created for the purpose of serving public needs. While insuring a sound currency and furnishing a ready market for governmental securities, their functions as fiscal agents and depositories for public funds of the United

States were also important elements which led to the creation of the banks.

National banks have two aspects, namely, that of private banking corporations and also that of governmental instrumentalities. It was the private aspect of national banks which was considered by this Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, and the rule of equality of treatment of depositors was held to govern. A different rule should apply where a national bank, an instrumentality of the Federal Government, secures the public funds of that government.

The development and use of governmental instrumentalities and agencies have carried over to such agencies the authority and power to demand a pledge of assets to secure public moneys. Congress has been made aware of this practice at least insofar as the Secretary of War is concerned, and could not have intended that federal agencies, in order to fulfill their duty safely to keep the public funds, should be compelled to resort to state banks which ordinarily may pledge their assets to secure deposits.

Other statutes, as well as Section 5153, requiring certain officials to exact a pledge to secure deposits, do not negate an underlying power in national banks to secure federal public funds. Their provisions are mandatory and do not contradict the implied permisive powers of other officials. There

is no reason to believe that Congress did not intend to protect all federal public funds.

3. The administrative interpretation of the Act accords with this view. For over sixty years the Secretaries of the Treasury and Comptrollers of the Currency have authorized and approved the action of the national banks in pledging their assets to secure public funds. An administrative construction of such length is entitled to greatest consideration. Certainly the Act here under consideration is not free from doubt, and the rule of *United States* v. *Midwest Oil Co.*, 236 U. S. 459, should apply: where there is a long-continued administrative practice, great weight should be given to the practice itself in determining its authority.

4. The nature and character of the funds deposited in the instant case disclose their governmental character.

The Inland Waterways Corporation was formed to carry out the announced policy of Congress relating to the development and operation of the Inland and Coastwise Waterways. It performed a function formerly entrusted to the Secretary of War and still continues to operate under his supervision and control. Its entire funds consist either of capital entirely subscribed by the United States or of receipts from earnings made by it with equipment and property transferred to it by the United States.

The United States Shipping Board Merchant Fleet Corporation was created by the United States Shipping Board, a department of the Government, to carry out important governmental functions relating to shipping. All of the capital stock of the corporation was subscribed for by the United States and after that capital was expended, huge sums appropriated by Congress to be disbursed by it. By statute all of its property and assets have been transferred to the United States and it serves only as an agent, having no property of its own.

Both corporations deal with governmental moneys exclusively. The properties of corporations of this character have not lost their public character because the Government chose to have legal title taken in the name of the corporation. While the petitioners are free from strict Treasury regulations, the funds handled by them are none the less public funds.

5. Aside from other considerations, in view of the personal participation by the Secretary of the Treasury in effecting the pledge of assets to secure the Panama Canal funds, it would seem that that pledge was effected in substantial compliance with Section 5153. A former Secretary of the Treasury, consulted by a predecessor of the petitioner Woodring, advised and assisted in the making of the deposit and the exaction of security, not only that involved in this case but also that involved in the companion case of *Woodring* v. *Wardell*, No. 5, this Term.

II

It was argued below if the pledges were invalid, the deposits likew were invalid, and the bank became a trustee *ex maleficio* for the deposits of the Inland Waterways Corporation and the Fleet Corporation. The funds involved were governmental moneys and if the petitioners were required to deposit such moneys either in the Treasury of the United States or in a designated depository, then the deposit was illegal. However, we do not believe that the Inland Waterways Corporation should have deposited the funds in the Treasury; and the illegality of the Fleet Corporation deposit has been cured by Congress.

If, however, we are wrong and the deposits, or either of them, were illegal, then under well-accepted principles the bank acquired no title to the funds and held them as a trustee *ex maleficio*. It is well settled that where a receiver of a national bank takes over the assets of a bank, he takes them subject to any trust then existing. It is only necessary that the trust be established and that the funds be traced into the hands of the receiver. On the assumption of illegality, an opportunity should be afforded petitioners to trace the trust funds into the hands of the receiver.

The fact that the receiver may not have sufficient funds in his hands at the present time to satisfy the trust would constitute no defense. His payment to the petitioners of the amount of their de-

posits from the proceeds of the bonds was a substantial discharge and satisfaction of the trust; or, viewed from another aspect, the mutual agreement between the parties substituted the pledged bonds for the unextinguished trust and thereby discharged the mutual claims of one against the other.

Finally, if the receiver had in his possession adequate assets to have discharged the trust, but has dissipated the same through the payment of dividends to the creditors, he has been guilty of conversion and may not now maintain the instant action.

III

In any event, the pledge of the assets to secure Canal Zone deposits was valid under established Canal Zone practice and ratifying acts of Congress; moreover, the action should be reversed against the petitioners Woodring and Smith because the United States is a necessary party to the suit, as developed in our brief in *Woodring* v. *Wardell*, No. 5, this Term.

ARGUMENT

I

The Pledge by the Bank of Its Assets to Secure the Deposits of Government Moneys Made by the Petitioners in the Present Case Was Valid

In asserting that the pledges made in the present case were valid, we call attention to two cardinal elements of the situation presented by this case.

The pledges were made to secure deposits of governmental moneys made by the petitioners in their capacity as agents and instrumentalities of the United States. And the pledge of its assets was made by a national bank—an institution whose existence is constitutional only because it is an instrumentality of the United States.[7] The assertion that the pledges made were invalid disregards this relationship between the national banks and the United States.

1. *The Fiscal Background of the National Banking Act*

The history of the deposits of governmental moneys prior to the National Banking Act of 1864 supports the view that the national banks have authority to pledge their assets to secure deposits such as those made by petitioners. That history shows that, after an early, bitter experience with unsecured deposits of public moneys, the importance of obtaining security for deposits of governmental funds was recognized and was integrated into our fiscal policy.

Prior to the adoption of the Constitution, and under the Articles of Confederation, such moneys as were possessed by the Confederation were deposited in private banks.[8] In its preamble the Act

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[7] *McCulloch* v. *Maryland*, 4 Wheat. 316, 424; *Farmers', etc., Nat'l Bank* v. *Dearing*, 91 U. S. 29, 33; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 209, 211.

[8] *John Burton Phillips*, Methods of Keeping the Public Moneys of the United States, p. 1; Pub. of Mich. Political

of February 25, 1791, establishing the first Bank of the United States (c. 10, 1 Stat. 191), set forth that the formation of the bank "will be very conducive to the successful conducting of the national finances". The major portion of the deposits of public money was made with that bank, although state banks were employed to some extent.[9]

Between 1811 and 1817, after the expiration of the charter of the Bank of the United States, the Federal Government deposited its money in state banks. The arrangements during that period of time which were entered into by the United States and the banks disclose a complete absence of any requirement for the banks to furnish security for the keeping of public moneys. Phillips states, p. 16:

> It seems that the Government was in the same position as a private citizen in that respect, and this argues an unlimited amount of confidence on the part of the Secretary and officials in the stability of the banks. Later history showed this confidence to have been clearly misplaced and the resulting losses severe. After the Government began

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Science Association, Vol. IV, No. 3, Dec. 1900. No legislation respecting the deposit of such public moneys was enacted prior to the Act of March 3, 1809, c. 28, 2 Stat. 535, 536, which provided that disbursing officers should keep their funds in some incorporated bank designated by the President.

[9] *Phillips, supra*, pp. 7, 9; *American State Papers*, Finance, Vol. 1, p. 691; *Bolles*, Financial History of the United States, 1789–1860, pp. 18–19.

requiring collateral security of the deposit banks, its losses from this source were only nominal.

As a result of financial conditions arising during the War of 1812, the banks suspended payment in specie. The entire deposit arrangement proved most unsatisfactory, resulting in the Government's being embarrassed for lack of funds.[10] It has been estimated that as a result of this brief experience, when the Government "was in the same position as a private citizen," the Government lost approximately 46 million dollars through its deposits with state banks. House Report (Committee on Ways and Means) No. 358, 21st Cong., 1st Sess., Vol. 3, p. 12.

In 1816 the second Bank of the United States was chartered, and with it were placed practically all deposits of public moneys of the United States. A few state banks, however, were used as depositaries. Phillips, p. 45. No losses were suffered by the United States as the result of its deposits in the second Bank. *Phillips*, pp. 47, 50, 52.

The second Bank of the United States, however, was not beyond reproof in other respects, and the question of an extension of its charter became a major political issue. In 1833, Taney, the then Secretary of the Treasury, under statutory authority, withdrew the deposits of governmental moneys from the second Bank. He stated that the bank

[10] *Babcock*, The Rise of American Nationality, Vol. IV, pp. 219, 220.

had admittedly been "incorporated in order to create an useful and convenient public agent to assist the Government in its fiscal operations," and that, like every other public agent or officer, its own separate interests should be subordinate to its duty to the public. Sen. Doc. No. 2, 23d Cong., 1st Sess. (Ser. No. 238), p. 11.

Taney advised the Senate that he had placed deposits of public moneys with state banks under contracts whereby, should the banks obtain deposits of public moneys in excess of one-half of their paid-in capital, security for such deposits would be required. In addition, the Government reserved the right to demand security whenever it was thought advisable.[11] The deposits were continued by Taney, and his successors, in state banks, and the second Bank of the United States was allowed to expire by the terms of its charter in 1836.

By the Act of June 23, 1836, c. 115, 5 Stat. 52, Congress required the Secretary of the Treasury to select as depositaries of money of the United States, banks incorporated by the several states, by Congress for the District of Columbia, or by the territories. Section 6 provided that it should be the duty of the Secretary of the Treasury, whenever in his judgment the same should be necessary and proper, to require of any bank so selected, col-

[11] *Kinley*, The Independent Treasury, p. 17. A typical agreement, the one between the Treasury and the Girard Bank of Philadelphia, is set out in Phillips, at pp. 54–55.

lateral or additional securities for the safekeeping of the public moneys. As a consequence of this Act, between June and December, 1836, the number of depositaries was increased from thirty-three to eighty-one. Collateral security was required and obtained of all save a very few of these. *Phillips, supra*, p. 63.

Under another provision of the Act of June 23, 1836, c. 115, 5 Stat. 55, all surplus in the Treasury in excess of $5,000,000 was directed to be deposited with the "Treasurers, and other competent authorities" of the several states. The sudden withdrawal of this surplus money from deposit banks, coupled with certain economic conditions, brought on the panic of 1837. *Dewey*, Financial History of the United States, 12th Ed., pp. 229–231. In the panic of 1837, eighty-four of the eighty-eight deposit banks suspended payment of specie, and again the Government was unable to meet its obligations. *Channing*, Vol. 5, p. 460. Phillips states (pp. 80, 85, 86) that the Government's embarrassment did not lie wholly in its failure to secure the public money then in the deposit banks, but that there had been an error in the estimate of the revenues for 1837. Senate Document No. 2, 25th Cong., 1st sess.

Thereafter, the major portion of the receipts of the Government was retained by the various collectors and by the Treasury. Phillips, pp. 87, 88, 102. The first subtreasury act, passed July 4, 1840, c. 41, 5 Stat. 385, was repealed, after a year, by the

incoming Whig administration. At the same time the Act of June 23, 1836, was repealed. The Whigs did not enact expected legislation which would have created a third bank of the United States. *Phillips*, pp. 111, 112; *Channing*, Vol. 5, pp. 464, 465. Again the deposits of public moneys of the United States were made in the manner directed by the Secretary of the Treasury and the President.

In 1841, Secretary Ewing selected state banks as depositaries and entered into agreements with them whereby each bank agreed to give collateral security if the public deposits exceeded one-half of its paid-up capital, or whenever the Secretary required it.[12] This provision was substantially the same as that contained in Taney's agreements with the depositaries made in 1833. These agreements remained in effect until 1846, when the second subtreasury act was passed, practically eliminating deposits of public moneys with banks.[13] This system continued in effect without substantial change until 1863, when there was enacted the first of the National Currency Acts creating national banks.

In summary, it is evident that, during the peri-

[12] Ex. Docs. No. 123, 27th Cong., 2d Sess., p. 2. A copy of the agreement is set out in Phillips at p. 113.

[13] This Act required all moneys of the United States to be deposited either in the Treasury of the United States or in certain designated subtreasuries. Sec. 16 of the Act made the loan or deposit of public money by an officer or agent of the United States a statutory crime of embezzlement provided the deposit was not made as provided by law. Act of August 6, 1846, c. 90, 9 Stat. 59.

ods when the Government was depositing its moneys generally in banking institutions, a fiscal policy had been evolved which required the banks to agree to give security to safeguard the deposits. This was not true during the period between 1811 and 1817, and grave losses resulted. When Secretary Taney withdrew the deposits from the second Bank of the United States in 1833, he required the state bank depositaries to agree to give security. This provision was retained in the 1836 legislation, which remained in effect until 1840. In 1841 Secretary Ewing, left without statutory command, again entered into contracts containing provisions agreeing to the giving of security, and those contracts continued until the second subtreasury system of 1846. The exaction of security was doubtless in part responsive to the dissatisfaction with political and personal considerations which had motivated deposits of public funds in certain local banks. But the all-important consideration was the integrity of the public moneys.

2. Government Deposits Under the National Banking Act

The history of deposits of public moneys, part of which has been traced, illumines the scope of the Act of June 3, 1864 (c. 106, 13 Stat. 99, 113), creating national banks. They were created "in order to provide a uniform and secure currency for the people, and to facilitate the operations of the

Treasury of the United States." *Mercantile Bank v. New York,* 121 U. S. 138, 154. Several objectives were sought in the Act. The primary purpose was to secure national uniformity in the issue of currency (Cong. Globe, 38th Cong., 1st Sess., p. 2125). It was desired to have banks under federal charter purchase government bonds and issue currency based upon such bonds. Interrelated with the other ends of the Act was the provision for the deposit of public moneys in the national banking associations.[14]

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[14] In an article entitled "The Origin of the National Banking System" by Andrew MacFarland Davis, printed as Senate Document 582, 61st Congress, 2d Session, and reprinted in Volume 5 of the publications of the National Monetary Commission, the need which obtained at the time of the passage of these Acts for a uniform, dependable national currency and a national banking system is described. The motives which impelled this legislation are given as follows at page 106 of Vol. 5 of the publications of the Commission:

"The various reports of the Secretary, his speeches, his correspondence, the discussions in Congress, the newspaper articles, and the contributions to magazines all agree that the following were the benefits to be derived from the passage of the bills: A uniform currency controllable in amount by the General Government, and receivable for taxes by the Treasury; a market for a large block of government securities, * * * the creation of a large number of institutions under national control widely distributed over the country, *which could not only serve as depositories for government funds, and thus relieve the collectors of internal revenue and other government officials having custody of such funds from the anomalous situation in which they were placed under the existing law,* but which could also act as the fiscal agents of the Treasury, and could receive subscriptions to loans and distribute bonds to subscribers; and, finally, the stimulation

The Act created the banking associations as instrumentalities of the Government, in the conduct of its affairs, intended to subserve public purposes and not private interests. *Bank* v. *Lanier*, 11 Wall. 369, 374; *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 394; *Christopher* v. *Norvell*, 201 U. S. 216, 225. Indeed, the constitutionality of the Act of 1864 has been unquestioned, and has been supported on the authority of *McCulloch* v. *Maryland* (4 Wheat. 316), precisely because the national banks "are instruments designed to be used to aid the government in the administration of an important branch of the public service." *Farmers', etc., Nat. Bank* v. *Dearing*, 91 U. S. 29, 33.

In discarding a strict subtreasury system and in providing for the deposit of public moneys in privately owned banks, Congress did not reject, but rather gave its approval to the fiscal policy evolved in the 1830's and 1840's of safeguarding such deposits by the taking of security. The debates indicate an awareness that an indiscriminate deposit of public moneys with unsecured banks was to be avoided in order to protect the fiscal integrity of the United States.[15] Section 45 of the Act (R. S.

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of the patriotism of the people * * *." [Italics supplied.]

The deposit of public money in private banks has ordinarily been eagerly sought. Phillips, pp. 59–75. See debates on Senate Bill 5876, 45 Cong. Rec. 1324 *et seq.* Cf. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, note 13, p. 258.

[15] See Cong. Globe, 37th Cong., 3d Sess., Pt. I, pp. 843, 844.

Sec. 5153, 12 U. S. C., sec. 90) authorized the Secretary of the Treasury to designate certain national banks to be depositaries of public moneys and required him to procure a pledge of assets to insure the safekeeping and prompt payment of the public moneys deposited with them.

Since the national banks were established as instrumentalities to aid the government of the United States, it seems plain that their powers to render such assistance should not be narrowly confined. In Section 45 Congress made it "the *duty* of the Secretary of the Treasury to require them to give satisfactory security" for the Treasury funds deposited by him (*Cook County Nat. Bank* v. *United States,* 107 U. S. 445, 449). [Italics added.] This in no wise indicates that Congress intended to deny other officers in control of governmental funds the *power* to obtain such security in the best interests of the Government. Congress did not intend that the principle of security for governmental deposits, evolved in the past as a wise fiscal policy and given vigorous approval by Section 45 itself, should be confined solely to deposits made by the Secretary of the Treasury under Section 45.

National banks have two aspects: They were created primarily to perform a governmental function, to enable the government better to discharge its fiscal and credit obligations. At the same time it was conceived that an instrumentality taking the form of an ordinary private or state banking insti-

tution would best serve the government. The sub-Treasury system was inflexible. It was not possible through it to secure the end of uniform currency, adequate distribution of governmental securities and safe-keeping of certain types of government moneys. The Bank of the United States had become a major political issue and the state banks were thoroughly distrusted.

If these two aspects of national banks are kept sharply in mind, namely: the function as a government instrumentality on the one hand and on the other the activities of an ordinary banking institution, the decisions in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, will be seen as not reaching the issue which is presented in the instant case. Those cases were decided not upon the basis of specific statutory language precluding a pledge of assets, but rather upon a consideration of the purposes of Congress in creating national banks. Cf. *McNair* v. *Knott*, 302 U. S. 369, 371.

Private funds were involved in the *Pottorff* case; municipal funds, which from the point of view of the federal financial institutions are in the same category, were involved in the *Sneeden* case. Therefore, only those policies of the Congress relating to the private banking functions of the national banks were drawn in question in the *Pottorff* and the *Sneeden* cases. From this view, the primary policy of the National Banking Act is, of course,

the equality of treatment of depositors. This is not a matter of policy merely in relation to national banks, it is a traditional policy in respect of banking institutions generally. It was for this reason that this Court in reaching its conclusion that securing deposits was illegal was able to draw on the literature relating to ordinary banking practice.

In the present case, however, federal funds are involved. The issue is what are the powers of the national banks in the discharge of their functions as governmental instrumentalities, not as private banking institutions. In this connection, clearly enough, the primary policy of Congress cannot be equality of treatment. The entire fiscal history of the national government is studded with evidence of an entirely contrary policy, that is, the policy of the Congress to see above all that the funds of the United States are secure and readily available in time of need. While the primary policy of Congress may be the policy of equality of treatment in respect of private funds, including the funds of other governments within the United States, where the national bank is viewed as a government instrumentality the primary policy is one of security, availability, facility of handling for the national funds.

In the *Sneeden* case, even though the pledge of assets to secure deposits of public moneys of states or their political subdivisions may have been a common practice, the Court was apparently unwill-

ing to impute an intent on the part of Congress to permit national banks to pledge assets to secure these funds where the state itself was unwilling to confer like authority on banks which it had created. This reluctance cannot be present when the funds are those of the federal government itself.

There is no basis for suggesting that the policy of securing federal funds approved by and made compulsory in Section 45 was limited to deposits made by or pledges taken by the Secretary of the Treasury. Congress did not intend to strait jacket its handling of federal funds under pain of denial of the protection of security. The national banks were created as instrumentalities responsive to the needs of the governmental agencies. The Canal Zone officials charged with the safekeeping of a postal fund of $700,000 cannot be thought to have departed from Congressional policy by depositing the moneys in a national bank under an agreement to give security for their deposit. Likewise, the corporations involved in this case were utilized as a convenient machinery to secure to the Federal Government the advantage of greater flexibility resulting from their freedom of strict accountability to forms and procedures of the regular Government establishments, and it was not intended that the Government should be jeopardized by its own machinery, or that it should unnecessarily sacrifice advantages which it enjoyed when functioning through other machinery. *Emergency Fleet Corp.*

v. *Western Union*, 275 U. S. 415; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *Clallam County* v. *United States*, 263 U. S. 341; *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106.

National banks have powers "necessary to carry on the business of banking * * * by receiving deposits" (Sec. 8). The deposit of the funds of a government which believes in the securing of its funds carries with it the incident of security for the deposit. Insofar as Section 45 authorizes the bank to give security for public moneys, the authority betokens a statutory policy which extends to this case. See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381. The frequent development of governmental enterprise into forms which put the governmental moneys under the control of officials other than the Secretary of the Treasury carries over to such officials the responsibility of safeguarding of deposits by the taking of security. The distinction that the Secretary of the Treasury would be *required* to take security does not avoid the *power* of others in charge of Government moneys. Possibly Congress has been reluctant to extend to corporate agencies hard and fast rules as to how they should keep their moneys. This reluctance is not to be construed as a denial of power effectively to safeguard the funds of the United States.

Congress was made aware of the taking of security by the Secretary of War in reports made to it between 1910 and 1920. This procedure was never

subjected to criticism, and was, indeed, confirmed by the Act of 1916. See Brief for Petitioners, No. 5, this Term, pp. 34–37. It was undoubtedly expected and anticipated by Congress that the other agencies which it soon after created to handle government funds free of Treasury control might likewise have the funds secured if thought desirable.

Should respondent's contention be correct, we would have presented an incongruous situation. Agencies and instrumentalities of the Government, simply because they were freed from Treasury control, would in the interest of security of their funds be compelled to deposit such funds either in state banks or private banking institutions, which ordinarily are taken to have the power to pledge assets to secure deposits of public moneys.[16] We do not think that Congress intended such a result. In the recent case of *Berger* v. *Chase National Bank*, decided July 24, 1939, the Circuit Court of Appeals for the Second Circuit, in discussing a similar situation in respect of deposits of the Philippine Islands said:

> We are brought therefore to the inquiry whether this legislation can be considered properly a regulation of the affairs of the territory, as distinguished from those of the country at large, and whether it violates any specific legislation or legislative policy of the Congress. As to the latter, it is quite

[16] See 42 Harv. Law Rev. 272; 79 Univ. of Pennsylvania Law Rev. 68.

clear from the several instances cited above where pledges by national banks have been authorized that it does not. Indeed, an opposite result would be definitely out of line with a well-recognized policy, for it would give the state banks a monopoly upon Philippine deposits in this country, contrary to the established policy of placing the national banks on a competitive equality with state banks. *McNair* v. *Knott, supra.* Indeed it would go still further and prefer the local banks in the Philippines to the branches of the national banks there, for the legislation in question is surely valid so far as it designates depositaries in the Islands themselves.

The administrative practice in connection with the taking of security will be discussed below, pp. 40–46. But it is meet to note at this point that the giving of security for deposits of federal agencies does not offend against banking practice, or a sense of banking propriety, as was the situation in the *Pottorff* case. *Willis, Chapman, and Robey,* Contemporary Banking, pp. 110, 336. And in England, at least some public bodies customarily obtain security for their deposits without specific statutory approval. *Walter Bagehot,* Lombard Street (14th ed. 1927), pp. 101–102.

Respondent may rely upon the fact that in certain statutes Congress has made specific provision for security safeguarding certain funds. See Section 61 of the Bankruptcy Act, c. 541, 30 Stat. 562, Section 9 of the Postal Savings Act, c. 386, 36 Stat.

816, the Acts relating to Indian moneys, c. 86, 40 Stat. 591, to Insolvent Bank funds, c. 121, 39 Stat. 121, to Porto Rican funds, c. 145, 39 Stat. 954, 956, and to Government Obligations, c. 56, 40 Stat. 291.[17] These statutes, like Section 45 of the National Bank Act of 1864 (see *supra*, p. 31), are not permissive but mandatory in respect of the requirement of security. The word *shall*, and not *may*, *is* used. The Acts are entirely consonant with an underlying power on the part of the banks to pledge their assets to secure federal public moneys. Indeed, these statutes rather reenforce the proposition conceding power in the national banks to safeguard deposits of funds belonging to the United States. Except for the statute relating to the proceeds of government loans (which also authorized deposit in and taking security from state banks), each deals with moneys in which the United States has no beneficial interest. It would seem anomalous to urge that the Government should be indifferent as to the security of its property handled through corporate entities, or other

[17] These statutes direct officers to require a pledge of assets, without a corresponding grant of power to the national banks to pledge such assets. In the *Pottorff* case this Court suggested that Congress intended to make valid every pledge called for by statute. For reasons of public policy it might likewise be urged that Congress intended every pledge to be valid where the nature of the duty performed by an agent or instrumentality seems to indicate the necessity for such pledge. The cases at bar are apt illustrations of the necessity of securing deposits of public moneys so as to preclude the possibility of an ultimate loss to the Government.

agents not required to deposit funds in the Treasury, while at the same time it shows deep concern over other funds in which the United States possesses no substantial beneficial interest.

3. The Consistent Administrative Practice

The administrative interpretation of the Act accords with this view. Beginning in 1910, a predecessor of the petitioner, Woodring, upon the advice of and with the knowledge and consent of the Secretary of the Treasury, opened an account with the Commercial National Bank for the deposit of Canal Zone funds.[18] He obtained the pledge of assets by the bank to secure the deposit. This fact was well known to succeeding Secretaries of the Treasury and Comptrollers of the Currency. It was likewise known to Congress. No question regarding the propriety of this procedure was raised before the instant case and the companion case of *Woodring et al.* v. *Wardell*, No. 5, this Term. In addition to the instances of deposits of Canal Zone funds, funds of the Inland Waterways Corporation and the moneys handled by the Fleet Corporation, deposits were made of funds by the Alien Property Custodians and of the funds of the Philippine Islands, under pledge agreements substantially similar to

[18] The letters from Lt. Col. Goethals to Secretary of War Wright during 1908 (Appendix, pp. 51–52) refer to similar existing deposit arrangements between the International Banking Company and the War Department covering the deposit of Philippine funds.

those here considered. Such deposits were made not only with the Commercial National Bank, but also with a number of other national and state banks.[19] We have been unable authoritatively to list all instances where instrumentalities and agents of the Federal Government entered into arrangements similar to those here involved,[20] but it seems clear that had any such instrumentality or agent desired to make substantially similar banking arrangements, they would have been administratively approved, at least prior to the decisions in the *Pottorff* and *Sneeden* cases. It was not doubted by the Comptrollers of the Currency and their staffs that national banks had such authority.

With a letter of April 27, 1934, addressed to the President of the United States Senate by the Secretary of the Treasury, there was inclosed a memorandum advising an amendment to Section 5153 of

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[19] We are advised that the Inland Waterways Corporation had secured deposits with six national and four state banks. Funds of the Philippine Islands were deposited with 45 national and 20 state banks. *Berger* v. *Chase National Bank*, *supra*, p. 37. Funds of the Fleet Corporation were deposited in 80 or 90 banks over the world, 69 Cong. Rec. 1959.

[20] However, in an effort to determine administrative practice in this respect, we have been advised that similar deposits have been made in national banks by a number of corporate agencies or instrumentalities, which deposits were secured by a pledge of assets. These include the Panama Railroad, the United States Housing Corporation, the United States Spruce Production Corporation, the American Red Cross, the Bureau of Prisons of the Department of Justice, the Veterans' Administration, and at least one Home Loan Bank.

the Revised Statutes. Senate Document No. 175, 73rd Congress, 2d Session. The Secretary of the Treasury pointed out to Congress the long continued administrative construction which had prevailed, and urged Congress to enact clarifying legislation, permitting the taking of security to safeguard deposits of public moneys of the United States made by government officials and agencies generally.[21] In the memorandum, which is deemed significant enough to be set out at length, it is stated:

> Attached hereto is text of proposed amendment to Section 5153 of the Revised Statutes, as amended (U. S. C., Title 12, sec. 90), which amendment relates to the designation of depositaries of public money by the Secretary of the Treasury and the giving of security by national banking associations for deposits of public money of the United States and for various other types of deposits made by public officials, consisting of money for which they are accountable under the law by virtue of their official capacity. The essential respects in which this amendment changes the present law is in that *it*

[21] No action was taken in Congress with respect to this proposal other than the introduction, on May 7, 1934, of a bill, S. 3558, which was never reported out by the Committee on Banking and Currency. There is no explanation of this inaction, but it seems more probable that Congress thought the Secretary's fears unjustified than that it thought the security for deposits undesirable. Compare *McNair* v. *Knott*, *supra*, 371–372.

eliminates doubt under recent decisions as to the power of national banks to give security for the protection of deposits of public money belonging to various Government agencies or of money deposited thereby where they are accountable for such money by reason of the official capacity in which held.

* * * * *

There is urgent necessity for the prompt enactment of this legislation, due to recent decisions of the Supreme Court of the United States, particularly two decisions rendered February 5, 1934, in *City of Marion, Illinois,* v. *Sneeden, Receiver* and *Texas and Pacific Railway Company* v. *Pottorff, Receiver,* in which *the Court took the position that national banks have no implied power to give security for deposits of public money, notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency,* in conformance to the views expressed by the Attorney General of the United States (in 30 Ops. Atty. Gen. 341), to the effect that the section being amended "is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits than as a grant by implication or authority to give security for Government deposits alone." *A large number of national banks have been placed*

in the hands of receivers in the past 3 years. Almost all of these banks held deposits of public money for which security had been pledged. Millions of dollars in such deposits belonging to the Philippine Islands, the United States Shipping Board, Emergency Fleet Corporation, United States Housing Corporation, and similar entities were on deposit in these banks under a contract, whereby the bank had pledged collateral security therefor. *These pledges were considered valid by this office* and these agencies permitted to avoid loss of such deposits through realization upon the collateral held. Unless curative legislation is enacted to cover this situation, it may be the duty of this office as a matter of law to require these various agencies to restore these funds to the receivers of the various banks in which they were on deposit. Creditors of some of the banks are insisting upon such action being taken at this time. If such restoration must be made, then in most cases a substantial loss will be suffered by the depositing unit, which loss will in many instances ultimately fall upon the Treasury. *The situation is also urgent from the standpoint of the going national bank,* inasmuch as the various depositing units are now on notice as to the possible lack of power in the banks to give security for their deposits, with the result that *these banks are threatened with the withdrawal of hundreds of millions of dollars, which no doubt will be*

deposited in State banks which do under the State law possess power to give collateral security therefor. [Italics supplied.]

See also *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 149 (App. D. C.); *McNair* v. *Knott*, *supra*.

This long-continued administrative construction is, we submit, controlling under the familiar canons of construction. Certainly, the statute here involved is not free from doubt. At least some of the instances of the taking of security were brought to the attention of Congress in reports. (See Appendix, pp. 35–37.) The National Banking Act has frequently been amended. The question is a practical one, dealing with practical affairs of government and the protection of government funds. In these circumstances the case is one for the application of the doctrine of *United States* v. *Midwest Oil Co.*, 236 U. S. 459. In that case the Court upheld the power of the President to withdraw public lands reported to contain valuable petroleum deposits, although there was no statutory authority for it. The Court said (pp. 469, 472, 473):

> We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's procla-

mation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government."

* * * * *

It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

See also *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401–402; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 311–315.

4. The Deposits Consisted of Public Funds of the United States

In our view, then, the pledges can be defeated only if the deposits in question were not of governmental funds. But it seems clear that the funds deposited by petitioners in this case are as surely deposits of governmental funds, in which the United States is interested and which Congress intended to be safeguarded, as though they had been deposited as Treasury funds *eo nomine:*

(a) The organization, functions, and activities of the Inland Waterways Corporation (set forth at some length in its answer (R. 73–81)), may be summarized as follows: The Inland Waterways Corporation was created by the Act of June 3, 1924, c. 243, 43 Stat. 350 (49 U. S. C., Sec. 151ff.) for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system, until the system might be transferred to private operation, in order to promote and develop water transportation and facilities in connection with the commerce of the United States. There was transferred to the Corporation the transportation facilities and the floating equipment in the Mississippi River which had been purchased by the President through the Railroad Administration during the period of Federal control, and had been transferred to the Secretary of War for operation as the Inland and Coastwise Waterways service, Section 201 of the Transportation Act of 1920, c. 91,

41 Stat. 456, 458. The Denison Act of 1928 stated that the policy of Congress was to continue the transportation Service of the Corporation until: (1) navigable channels should be completed in the rivers where the Corporation operates, (2) adequate terminal facilities should be provided on such rivers, and (3) private persons should be engaging or ready to engage in common carrier service on the river. In that event the Secretary of War was to lease or sell to private persons or corporations the transportation facilities of the Corporation under terms approved by the President.

The Federal Control Act of March 21, 1918, had set up a revolving fund available for the purchase of the equipment. Under the Transportation Act of 1920, the operation of the Service by the Secretary of War was financed out of receipts from the Service placed in the general fund of the Service and disbursed as needed; an additional $1,225,000 was appropriated in 1921. Moneys made available to the Secretary of War were made available to the Corporation by Section 6 of the Act of its creation. Further moneys for the operation of the service were made available by Congress in the form of payments for the capital stock of the Corporation. The Corporation was endowed with the usual corporate powers and was incorporated solely by the Secretary of War, who was authorized to govern and direct the Corporation in its functions. The capital stock, all of which was subscribed for by the United States, was fixed at $5,000,000, to be

paid by the Secretary of War; the receipt of the Secretary for such payment was to be "evidence of the stock ownership of the United States" (Sec. 2, 49 U. S. C., Sec. 152). The Denison Act of May 29, 1928, c. 891, 45 Stat. 978, increased the capital stock of the Corporation to $15,000,000.

(b) A similar analysis of the United States Shipping Board Merchant Fleet Corporation (see answer, R. 35–38) discloses the following: Pursuant to authority contained in the Shipping Act of 1916, the Shipping Board caused the Corporation to be incorporated in 1917 under the laws of the District of Columbia, under the name "United States Shipping Board Emergency Fleet Corporation." The Board, on behalf of the United States, subscribed for all of the capital stock, in the sum of $50,000,000, which was paid to the Corporation from the Treasury of the United States, and was disbursed by the Corporation prior to 1918. All subsequent moneys received by the Corporation were received not as payment for the capital stock but from annual appropriations.

Section 4 of the Merchant Marine Act of 1920 provided that all vessels and property of whatever kind acquired by the Corporation be transferred to the Shipping Board. On April 16, 1923, the Corporation by formal deed conveyed to the United States all its personal property (R. 58). The Corporation thereafter performed functions delegated by the Shipping Board with respect to the sale and

operation of vessels owned by the United States and controlled by the Board, and with respect to the liquidation of the property transferred by the Corporation to the Board as aforesaid. From 1920 through 1932 Congress annually appropriated a huge sum to the Corporation in order to enable it to perform these functions.

The Corporation had two accounts in the Commercial National Bank. In its "Agent, Deposit Account" were deposited proceeds of government vessels, revenues derived from the operation of government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States which had come into the Corporation's hands as agent of the United States (R. 37–38). In its "Agent, Good Faith Deposit Account" were deposited funds delivered to the Corporation as agent of the United States as security for the performance of sales or purchase proposals. Checks on this account were drawn only to unsuccessful bidders for the return of their deposits, or to the Treasury when the deposit was forfeited or credited on the contract (R. 39).

(c) Both Corporations (which, for convenience, we shall discuss before treating the Canal Zone funds) perform governmental functions in the furtherance of the policy of Congress. They are both agencies of the United States, though clothed with corporate form so as to expedite the execution

of the functions. Indeed, the Inland Waterways Corporation is not even a typical corporate entity, but is rather another agent of the Secretary of War, who governs and directs its affairs and is only advised, and not controlled, by its board of directors. It seems plain that the funds controlled by these corporations are public funds of the United States. In its ordinary sense the term "public moneys" would appear to include all moneys equitably belonging to the United States, regardless of the source from which they may be derived. *Branch* v. *United States*, 100 U. S. 673.[22] Since the Federal Government is one of delegated power, its

[22] The term does not seem to be a word of art; nor to have received any comprehensive definition in any decision or statute. It has been held *inter alia* to include indemnity paid by foreign governments to the United States for claims on behalf of citizens (6 Ops. A. G. 590; cf. *Angarica* v. *Bayard*, 127 U. S. 251); moneys of the Home Owners' Loan Corporation (*Kay* v. *United States*, 303 U. S. 1, 8); funds held in trust for Indians (*Minis* v. *United States*, 15 Pet. 423, 448); processing taxes to be paid to the Philippine Islands (*Haskins Bros. & Co.* v. *Morgenthau*, 85 F. (2d) 677, 682 (App. D. C.), certiorari denied, 299 U. S. 588; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321); money recaptured from a railroad by order of the Interstate Commerce Commission (*Richmond, F. & P. R. Co.* v. *McCarl*, 62 F. (2d) 203, 206 (App. D. C.), certiorari denied, 288 U. S. 615); and postal receipts deposited at his own risk by a postmaster (*United States* v. *Porter*, 24 F. (2d) 139, 141 (D. Idaho)).

The only cases that we have found in which funds placed with a depositary were held not to be public moneys of the United States are those involving the deposit of funds in the registry of district courts. *Branch* v. *United States*, 100

every action within its constitutional power is a governmental action. *Graves* v. *O'Keefe*, 306 U. S. 466, 467. It follows that irrespective of the character (whether corporate or natural) of the agent through which the United States acts, the undertaking is governmental in character, and any funds which are applied or used in the furtherance of such an undertaking are public funds of the United States. See *Kiechhofer* v. *United States*, 19 App. D. C. 405, 411–412.[23]

U. S. 673; *Coudert, Administrator* v. *United States*, 175 U. S. 178; *Chatham & Phenix Nat. Bank* v. *Guaranty Trust Co.*, 256 Fed. 90 (C. C. A. 2d), certiorari denied, 250 U. S. 642.

[23] In discussing indemnity funds paid by a foreign government in satisfaction of international claims advanced by the United States on behalf of its nationals, the court stated (pp. 411–412):

"Plainly, therefore, this indemnity fund is public money of the United States in the broadest sense of the term. Indeed, it is not apparent how the United States could acquire or hold any money or property whatever except as public money or public property. For the United States exist only for public purposes; and whether they acquire money in the ordinary modes in which revenue is raised for governmental uses, or whether they receive it by way of donation, in trust to be applied to some great public purpose, such as the establishment and maintenance of the Smithsonian Institution, or whether the money has been demanded and recovered from foreign governments as compensation for injuries done to individual citizens and through such citizens to the national sovereignty, notwithstanding that in such case it has been received under moral, although perhaps not legal, liability to pay it out again to the individuals who have suffered such injuries, yet in all cases such moneys become the public money of the United States as soon

Theoretically, the Inland Waterways Corporation has legal title to the funds deposited by it: funds obtained from the subscription for its stock, or as a result of its activities in connection with the property which has been transferred to it. But, although the legal title may be in this Corporation, this Court recognizes that "in substance the * * * [funds are] the property of the United States." *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106, 113. See *Clallam County* v. *United States*, 263 U. S. 341; *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *King County, Wash.* v. *United States Ship. Board E. F. Corp.*, 282 Fed. 950, 953 (C. C. A. 9th).[24] This Court has, too, empha-

as they are received by any of its agents or by any department of the Government, and they remain such as long as they are held by it, or by any such department or agency, or as long as they remain under control of such department or agency."

[24] The court, in holding that property of the Fleet Corporation was exempted from local taxation, said:

"* * * But here, admittedly, the property is not only held by a governmental agency, but was acquired with public funds, and was to be used exclusively for public purposes. To hold that it lost its public character, because the government chose to have the legal title taken in the name of a corporation, which it brought into existence and completely controls for its own convenience, and the entire capital stock of which it owns, would be to sacrifice substance to form. * * *

"* * * Clearly, in the matter of expending this public money, under the direction of Congress and the President, in the purchase of property for governmental purposes, and in taking and holding the legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the government. * * *"

sized that any shrinkage or loss of such funds is, in effect, a loss of public moneys of the United States, in the sense that additional appropriations from the Treasury will be necessary to carry out the governmental functions entrusted to such agencies, or that the return to the United States derived from the earnings of such corporations will *pro tanto* be diminished. *Kay* v. *United States*, 303 U. S. 1, 8; *United States* v. *Walter*, 263 U. S. 15, 17–18. The interest of the United States in the United States Shipping Board Merchant Fleet Corporation has already been specifically recognized by this Court. In *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, this Court said (pp. 422–423):

> First. It is argued that the government rate should be denied because the Fleet Corporation is a private corporation. In form, it is such. But all of its $50,000,000 capital stock was subscribed and paid for by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone has had a financial interest in its capital stock. The United States alone has contributed the additional money needed from time to time for the conduct of its business. The Fleet Corporation has, of course, received from others moneys in payment for property sold, as charter hire, for shipping services, or in settlement of claims. But, as the business of the Fleet Corporation has been conducted continu-

> ously at a large loss, the sums so received did not supply capital. They served merely to reduce, to that extent, the amount of the deficit being incurred and, hence, the amount of the additional money which the United States was required to contribute. Payment by the Fleet Corporation of the commercial rate for messages would necessarily increase the charges upon the public treasury to the same extent, and in the same manner, as would the charge of the commercial rate in respect to the business done for the United States directly by the Shipping Board or that done for it by some other department of the Government. * * *

See also *United States* v. *Walter*, 263 U. S. 15, 17–18; *Russell Wheel & Foundry Co.* v. *United States*, 31 F. (2d) 826, 828 (C. C. A., 6th); *United States* v. *Czarnikow-Rionda Co.*, 40 F. (2d) 214, 215 (C. C. A., 2d); *Crane* v. *United States*, 73 C. Cls. 677, certiorari denied, 287 U. S. 601.

The good-faith deposits of the Fleet Corporation are likewise public moneys deposited with an agent of the United States as a condition precedent to the purchase of property of the United States. The moneys, which are applied toward the purchase price if the sale be consummated, and if not are returned to the purchaser, are public moneys of the United States while in the custody of one of its agents. *Smith* v. *United States*, 170 U. S. 372, 379.

Indeed, the court below agreed that the two deposit accounts in the name of the Merchant Fleet

Corporation consisted of money of the United States (R. 109). This was apparently also admitted by the bank (R. 68; see *supra*, note 4).

The public character of the funds involved in this case is in no way negated by the consideration that the moneys were not required to be covered into the Treasury, and were not under the general control of the Secretary of the Treasury.[25] The Federal Government has employed within the last generation many corporations and independent agents to carry out functions essentially governmental in character,[26] in order that these agencies might utilize commercial methods free of the restrictions characterizing ordinary government enterprises, and free of "accountability to the Treasury," *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8. Each corporation, therefore, was permitted to deposit the moneys entrusted to it in its checking account in a commercial bank.[27] Yet the funds

[25] We shall discuss below (pp. 63–70) the possibility that the deposits in respondent banks were illegal.

[26] *Federal Corporations and Corporate Agencies*, 16 Harvard Business Review, 436; *McDiarmid*, Government Corporations and Federal Funds, 31 American Political Science Review, 1095.

[27] The matter is not so clear as to the Merchant Fleet Corporation. It received moneys from the sale of vessels owned by the United States and under the existing statutes should have covered these moneys into the Treasury or some public depositary. R. S. Secs. 3617, 3618, 3621; 31 U. S. C. secs. 484, 487, 495. However, the Appropriation Acts for 1929 and subsequent years, by appropriating to the corporation the interest earned on its funds would seem to constitute a validation of the deposit. See discussion *infra*, pp. 65–69.

handled by these agencies and instrumentalities are none the less public funds, and they have an implied duty to keep such moneys safely.[28]

(d) Similar conclusions obtain with respect to the Canal Zone deposits. The postal money order and deposit money order funds are clearly funds derived from and to be used in the exercise of a public, governmental function. Such funds derived from the continental postal service are undoubtedly public funds. See *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S., at 257, note 11; *United States* v. *Porter*, 24 F. (2d) 139, 141 (D. Idaho); *Woodruff* v. *United States*, 58 Fed. 766 (C. C. D. Kansas). The funds are still public funds of the United States, the preservation of which is important to the United States, though their origin in the Canal Zone takes them out of the ordinary Treasury custody and renders them, instead, subject to the control of the Secretary of War and other officials having administrative functions in the Canal Zone.[29]

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[28] Compare *Kay* v. *United States*, 303 U. S. 1, 8; *United States* v. *Kapp*, 302 U. S. 214, 217–218; *Langer* v. *United States*, 76 F. (2d) 817, 824–825 (C. C. A. 8th); *Madden* v. *United States*, 80 F. (2d) 672, 674 (C. C. A. 1st); *United States* v. *Harding*, 81 F. (2d) 563 (App. D. C.).

[29] The theory with respect to the treatment of these funds is set out in Brief for the Petitioners, No. 5, this Term, note 12, pp. 23–24.

In any event, the deposit of the funds in respondent banks has been validated by the Congressional disposition of the interest earned on the deposits. Act of August 21, 1916, c. 371, 39 Stat. 528.

5. The Secretary of the Treasury Has Specifically Approved the Pledge to Secure the Canal Zone Deposits

If the Court should decide that the validity of a pledge to secure deposits of federal governmental funds is conditioned upon personal participation by the Secretary of the Treasury in the taking of the pledge, then we submit that the present case, at least as to the Canal Zone funds, involves such an approval of the Secretary of the Treasury of the making of the deposit and the taking of security as to indicate a substantial compliance with R. S. Sec. 5153.

The Canal Zone specifically pleaded in its answer (R. 85, No. 6)—

> that the action of the Secretary of War and his subordinates in negotiating for the giving of security to safeguard the deposits and of entering into said contracts was the subject of correspondence between both the Secretary of War and The Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury, and the entering into of the said contract of May 11, 1910, was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury.

This correspondence is reprinted (Appendix, pp. 46–58), and may be summarized briefly as follows:

The Secretary of War approved the suggestion of placing the Canal Zone funds on deposit in a

bank. Thereafter, the matter was taken up with the Treasury Department, which was asked what bonds would be considered satisfactory to secure the deposit. The Acting Secretary of the Treasury on April 21, 1910, advised what kind of bonds would be satisfactory security; and that the security should be kept in the safe of the Isthmian Canal Commission at Washington.

In response to a letter of the Secretary of War dated April 23, 1910, Secretary of the Treasury McVeagh replied that he would consider a deposit with either the Commercial National Bank or the Riggs National Bank satisfactory if secured by described bonds.

The contract of May 11, 1910, with the Commercial National Bank (R. 17–21) was entered into as a renewal of the contract of January 19, 1909.

On July 25, 1914, the Comptroller of the Currency wrote to the Secretary of the Treasury, in answer to the latter's memorandum, that the Commercial National Bank, the Continental Trust Co., and the District National Bank would be pleased to receive additional Canal Zone deposits and would provide securities to protect them. Secretary McAdoo, transmitting this memorandum to the Secretary of War, asked to be advised when the Secretary of War had taken action in the matter. The Secretary of War then informed the Secretary of the Treasury that it had been decided to make the new

deposit with the District National Bank of Washington.[30]

It may be suggested by the respondent that the tenor of these letters indicates that the Secretary of the Treasury, in his approvals and correspondence, was proceeding upon the assumption of a power in the bank, rather than upon a deliberate desire to invoke and make applicable the provisions of Section 5153 of the Revised Statutes. Yet we submit that his actions constitute a substantial compliance with that section, and that this Court should enforce the policy of the section to secure these accounts.

The Canal Zone moneys were public moneys within the meaning of this section. The allegation of petitioners in their answer (R. 90) that the funds are not public funds or part of the revenue of the United States subject to the control of the Secretary of the Treasury, means merely that the moneys are not revenues subject to the control of the Secretary of the Treasury. The funds would have had to be covered into the Treasury except upon the theory that the general federal statutes were not applicable to the Canal Zone. 11 C. D. 36. Even so, the statutes of Congress have made,

[30] Thereupon a contract dated August 18, 1914, was entered into with the District National Bank for a deposit of Canal Zone funds and the pledge of security by that bank to safeguard thedeposit. That transaction is involved in *Harry H. Woodring, Secretary of War et al.* v. *Wardell, Receiver*, No. 5, present Term.

and do make, provision for the Canal Zone postal moneys, appropriating them to the Canal Zone postal service.[31]

That the deposits were not made in the name of the Treasurer, or Secretary of the Treasury, is not of any significance. We are advised that the Secretary of the Treasury has exacted security to protect some Tennessee Valley Authority checking accounts, and that in the days when disbursing officials of the various departments had their own official checking accounts, the Secretary of the Treasury exacted security to safeguard the deposits. In *Branch* v. *United States*, 12 C. Cls. 281, 289, affirmed, 100 U. S. 673, the court noted that the Government takes security for its own public money on deposit in national banks, not only the funds under the control of the Treasurer but also "other Government money deposited there to the credit of other public officers charged with its receipt or expenditure," considered as public money.

The Secretary of the Treasury gave his approval to both of the Canal Zone deposits involved in these cases. He determined what banks would be willing to give security, and what kind of security would be safe, the same being the security specified for general deposits of public moneys. In substance, he determined the type of security obtained

[31] E. g., Section 3 of the Sundry Civil Appropriations Act of May 27, 1908, c. 200, 35 Stat. 386; Act of March 4, 1909, c. 299, 35 Stat. 945, 1026; Act of August 1, 1914, c. 223, 38 Stat. 674; Act of February 16, 1933, Sec. 1, c. 89, 47 Stat. 812. See discussion in petitioners' brief in No. 5, pp. 23–24.

as well as the identity of the depositary. The Secretary of War merely chose among the banks approved by the Secretary of the Treasury, and his selection was in turn made known to and approved by the Secretary of the Treasury.[32] We submit that even if Section 5153 of the Revised Statutes is limited to personal participation by the Secretary of the Treasury in the obtaining of the pledge, the circumstances of this case show substantial compliance with that section with respect to the Canal Zone deposits.

II

If the Deposits in the Respondent Banks by the Corporate Petitioners Were Invalid, the Receipt of the Deposits Gave Rise to a Trust Ex Maleficio Which Requires Reversal of the Judgment

It was argued below, by the Inland Waterways Corporation and the Merchant Fleet Corporation,

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[32] This suffices to show substantial compliance with the requirement of a designation by the Secretary of the Treasury.

In any event, it may be noted that both banks involved had been designated as regular or general depositaries of public moneys by the Secretary of the Treasury. This is indicated by the Annual Reports of the Secretary of the Treasury for 1910 to 1920. See e. g., Report of 1910, p. 221; Report for 1913, p. 278; Report for 1917, p. 431. On March 4, 1920, all the Treasurer's balances with all regular depositaries in the District of Columbia were withdrawn and all regular designations were terminated.

The subsequent discontinuance of regular or general depositaries of public funds in the District of Columbia would presumably not render automatically invalid contracts of security validly entered into.

first, that the pledge was valid, and, in the alternative, that if the pledge were invalid the original deposit in the bank was illegal; so that the funds deposited constituted a trust *ex maleficio*, and came into the hands of the receiver of the bank impressed with a trust; and that the delivery of the bonds or their proceeds constituted not an invalid preference but a discharge of petitioners' claim arising out of the trusts. If the deposits were illegal, we think the conclusion logically follows. We do not think, however, that the deposits were illegal. Because of the importance to the fiscal practices of the Government, and lest there be doubt as to their nature, we shall set forth our analysis of the problem.

A. THE VALIDITY *vel non* OF THE DEPOSITS

1. Inland Waterways Corporation

Any invalidity of the deposit must lie in R. S., Sec. 5497 (18 U. S. C., Sec. 182), which provides:

> Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose

> not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

The question turns on the meaning of this statute in making it unlawful for one not an "authorized depositary of public moneys" to receive from any agent of the United States "any public money on deposit." Unquestionably, the Inland Waterways Corporation is an agent of the United States, and its funds are public funds of the United States. See discussion, *supra*, pp. 49–57. The court below held that this statute did not have the effect of punishing the making of deposits permitted by law, that government corporations were created in order to obtain the advantages of commercial organization in governmental functions, and that their funds under this section were considered moneys of the corporation which could be deposited wherever general corporate practice dictated, without running afoul of R. S., sec. 5497.

The result reached below reflects the uniform understanding of all governmental corporations, and is believed to be sound beyond question. For purposes of the technical statutes relating to the manner of deposit of moneys, and covering into the

Treasury, the corporate form is sufficient to require that the moneys be treated *pro tanto* as that of the corporation and not of the United States as sole stockholder. See 22 C. D. 137 (Alaska Northern Ry.). Compare, also, 37 Ops. A. G. 1 (R. F. C.). This result also is implicit in the opinion in *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, finding the governmental corporations free of accountability to the Treasury.[33]

2. *Merchant Fleet Corporation*

As to this Corporation, a different picture is presented. The moneys deposited by it were not even theoretically moneys of the Corporation (R. 36–38). We have already seen (*supra*, pp. 49–50), that the money received from the Treasury for its capital stock, which may be viewed as money of the Corporation, was disbursed by it prior to 1918, and that all subsequent moneys were received from annual appropriations; that the Merchant Marine Act, 1920, transferred to the Shipping Board all the property of the Corporation and that in 1923 the Corporation formally conveyed its personal property (R. 58); that the moneys deposited by the Corporation in its "Agent, Deposit Account" were

[33] In some cases, however, Congress has prescribed that moneys which did not have to be covered into the Treasury be kept with the designated depositaries. *Cf.* Section 10 of the Transportation Act of 1920, with respect to the excessive profits paid in as a revolving fund to the Interstate Commerce Commission. See 33 Ops. A. G. 316.

proceeds of the sale of Government vessels, revenues derived from the operation of Government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States which had come into petitioner's hands as agent.

The funds are of a type which the statutes of the United States require to be covered into the Treasury. The funds are clearly embraced by R. S., Sec. 3617 (31 U. S. C., Sec. 484), Appendix, p. 2, which provides that "all moneys received from whatever source for the use of the United States * * * shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable." These funds, not derived from Corporation property but from Government property, were clearly received for "the use of the United States," and were received by an "agent," i. e., a corporate agent.

The proceeds of vessels and other property in liquidation are also specifically covered by R. S., Sec. 3618 (31 U. S. C. Sec. 487), Appendix, pp. 2–3, which provides that all proceeds of sales of public property of any kind, with exceptions not material, shall be covered into the Treasury as miscellaneous receipts. R. S., Sec. 3621, as amended (31 U. S. C. Sec. 495), Appendix, p. 3, provides that "Every person who shall have moneys of the United States in his hands or possession * * * shall pay the same to the Treasurer, or some public

depositary of the United States, without delay, and in all cases, within thirty days of their receipt." See also R. S., Sec. 3639, 31 U. S. C. Sec. 521, requiring all public officers "to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody".[34] These considerations demonstrate the invalidity of the deposit in the Commercial National Bank, located in Washington, D. C., and not a designated depositary, of public money required by law expeditiously to be covered into the Treasury.[35] These statutes provide no justification for the Corporation's practice of depositing the moneys in a Washington bank and then transferring them, after a while or "from time to time," to the Treasury (R. 35–39).

The conclusion that the funds held by the Merchant Fleet Corporation were required to be covered into the Treasury was entertained by the Comptroller General and his statutory predeces-

[34] The deposit account was opened Dec. 1, 1921 (R. 30). The Commercial Bank had previously ceased to be a general depositary, see *supra*, p. 62, note 32.

[35] The earnest money deposited by bidders, and kept by the Corporation in the Good Faith Deposit Account, though apparently not moneys required to be covered into the Treasury as "moneys received * * * for the use of the United States," within R. S. Sec. 3617, would seem to be included within the prohibition of R. S. Sec. 3639 against depositing in banks.

sors.[36] His views were forcefully stated in a communication dated June 16, 1931 (referred to at R. 47), Appendix, pp. 28–29, asserting that the moneys of the type which composed the deposit in this case were required to be covered into the Treasury. The same conclusion was again asserted with even more emphasis and finality in an opinion dated February 8, 1932, Appendix, pp. 29–35.[37]

However, this illegal deposit seems to have been ratified by Congress. In the Appropriation Acts for 1929 and subsequent years,[38] a provision allocated to the Merchant Fleet Corporation the interest on its "funds" (interest which the Comptroller General had ruled must be covered into the Treasury, see note 36). Congress was aware, as evi-

[36] 27 C. D. 311 (1920) held the statutes relating to public moneys applicable to appropriations made by Congress to Emergency Fleet Corporation, and finding no authority for the Corporation to place the use and custody of its moneys in another, by advancing funds as working capital for a marine insurance business; 5 C. D. 1004 (1926) held the interest upon appropriated moneys kept in banks to be moneys "received for the use of the United States" and therefore required to be covered into the Treasury; and querying the practice of maintaining such deposit accounts.

[37] We are informed by employees of the Maritime Commission that in 1933 the moneys were deposited in Fleet Corporation symbol accounts in the Treasury (not merely deposited with the Treasurer).

[38] Act of May 16, 1928, c. 580, 45 Stat. 573, 585; Act of February 20, 1929, c. 270, 45 Stat. 1230, 1244; Act of April 19, 1930, c. 201, 46 Stat. 229, 244; Act of February 23, 1931, c. 281, 46 Stat. 1355, 1371; Act of June 30, 1932, c. 330, 47 Stat. 452, 468; Act of June 16, 1933, c. 101, 48 Stat. 283, 298.

denced by statements made in the course of debate, that the interest in question was interest earned on the Corporation's deposits in a hundred-odd banks. See 69 Cong. Rec. 1959. The provision in question was prompted by the desire of the Shipping Board not to have to account monthly for its interest, which in many instances would require computations of conversion from foreign exchange. At the hearings the Board divulged that the Corporation had 178 domestic accounts in 81 domestic banks, and foreign accounts in 43 foreign banks. Hearings before the Subcommittee of House Committee on Appropriations on Independent Offices Appropriation Bill, 1929, p. 772.

In his opinion of February 8, 1932, the Comptroller General stated that the provisions appropriating interest merely disposed of the proceeds resulting from a prior illegal practice. However, this was not a single statute but a provision continued in several appropriation Acts. It was inaugurated upon the basis of Congressional knowledge of the existence of a large number of bank accounts. We think that these appropriation Acts clearly constitute a ratification of the deposits. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Mason Co.* v. *Tax Commission*, 302 U. S. 186.

3. *The Canal Zone*

The answer of the Canal Zone did not allege that the bank held the deposits as trustee *ex maleficio*,

and the issue with respect to these deposits was raised in neither court below. In addition, the deposits have plainly been ratified by Congress, as is shown in detail in our brief in *Woodring* v. *Wardell*, No. 5, this Term.

B. IF THE DEPOSITS WERE ILLEGAL, THE BANK HELD THE FUNDS DEPOSITED BY THE PETITIONERS AS TRUSTEE EX MALEFICIO AND THE RECEIVER TOOK THE ASSETS OF THE BANK SUBJECT TO THIS TRUST

1. We think, therefore, that none of the deposits were illegal. If, however, they were illegal, the bank acquired no title thereto. The law is well settled that a bank becomes a trustee *ex maleficio* where a deposit is not merely unauthorized but is forbidden by statute.[39] Cf. *Commercial Bank of Pa.* v. *Armstrong*, 148 U. S. 50, 59.

It is also settled that where the receiver of a national bank takes over the assets of that bank, he takes them subject to any lien or trust then exist-

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[39] *San Diego County* v. *California National Bank*, 52 Fed. 59 (C. C. Cal.); *Merchants' National Bank* v. *School District No. 8*, 94 Fed 705 (C. C. A. 9th); *Board of Commissioners* v. *Strawn*, 157 Fed. 49 (C. C. A. 6th); *Empire State Surety Co.* v. *Carroll County*, 194 Fed. 593, 603 (C. C. A. 8th); *City of Centralia* v. *United States National Bank*, 221 Fed. 755 (D. C., Wash.); *Allen* v. *United States*, 285 Fed. 678 (C. C. A. 1st); *American Surety Co.* v. *Jackson*, 24 F. (2d) 768, 769 (C. C. A. 9th); *Fiman* v. *State of South Dakota*, 29 F. (2d) 776 (C. C. A. 8th); *First National Bank of Forsyth, Mont.* v. *Fidelity & Deposit Co.*, 48 F. (2d) 585, 587 (C. C. A. 9th); *American Surety Co.* v. *Waggoner Nat. Bus.*, 83 F. (2d) 99, 101 (C. C. A. 5th).

ing. *Scott* v. *Armstrong*, 146 U. S. 499, 507, 510; *Early* v. *City of Helena, Ark.*, 87 F. (2d) 831, 832 (C. C. A. 8th); *United States* v. *National Bank*, 73 Fed. 379, 381 (C. C. W. D. N. C.). It is only necessary that the trust be established and that the fund be traced into the hands of the receiver. A presumption exists that, where subsequent to the creation of a trust the cash deposits in a bank never fell below the amount of the trust and where the assets of the bank are augmented by the trust fund, the trust is adequately traced into the hands of the receiver. *Cook* v. *Elliott*, 73 F. (2d) 916 (C. C. A. 4th); *Tucker* v. *Newcomb*, 67 F. (2d) 177, 179 (C. C. A. 4th); *Merchants' National Bank* v. *School District No. 8; Board of Commissioners* v. *Strawn; Allen* v. *United States; American Surety Co.* v. *Jackson; First National Bank of Forsyth, Mont.* v. *Fidelity & Deposit Co.; Fiman* v. *State of South Dakota;* all *supra* note 39.

Owing to the fact that the instant case was disposed of on the pleadings, the petitioners have had no opportunity to establish that the deposits augmented the assets of the bank, and that sufficient cash effects came into the hands of the receiver to satisfy the trusts. That opportunity, if the deposits are held illegal, should be afforded them. *Cook* v. *Elliott, supra*, 918; *Schumacher* v. *Harriett*, 52 F. (2d) 817, 820 (C. C. A. 4th). We respectfully submit, therefore, that if the deposits were illegal, the receiver took the assets of the bank sub-

ject to a trust in favor of the petitioners or the United States.

2. Whether or not the receiver now has funds sufficient to satisfy the trust, a fact not disclosed by the record, is immaterial if funds sufficient to satisfy the trust came into his hands when the bank closed. The turning over to each petitioner of amounts obtained upon the sale of the pledged securities, or of the securities themselves, by the receiver or his predecessor, with the consent of the Comptroller of the Currency, may be regarded as a satisfaction by the receiver of the trusteeship *ex maleficio*. To compass such a result would be most equitable since otherwise the petitioners would be deprived of their rightful property, and the general creditors would receive that to which they had no right. *Standard Oil Co. of Ky.* v. *Hawkins*, 74 Fed. 395, 402 (C. C. A. 7th). In substance the result is the same as if the receiver himself had sold securities in his possession and with the cash proceeds had satisfied a charge upon certain funds held by him for administration. Or, viewed from another aspect, the mutual agreement between the parties substituted the pledged bonds for the unextinguished trust, and thereby discharged the mutual claims of one against the other. *Cook* v. *Tullis*, 18 Wall. 332.

Furthermore, as to trust funds once under his control and now gone, the receiver would seem to be guilty of conversion, notwithstanding the fact

that the funds may have been paid as dividends to general creditors. Accordingly, whether he maintains the instant action in his personal capacity or in his capacity as representative of the creditors, he is subject to the setoff arising out of the conversion.[40] Nor may the creditors acting through him be unjustly enriched at the expense of the public by being allowed to benefit by his conversion of the trust fund. Recovery may not be had by them until they have restored the dividends which they have received as the result of his conversion.

III

Specifically, the Pledge of Assets to Secure the Canal Zone Funds Was Legal and, in Any Event, the United States Is a Necessary Party to the Suit As to Those Funds

The Canal Zone funds are identical in character with those involved in *Woodring* v. *Wardell*, No. 5, this Term. Independently of the general considerations here urged, and for the reasons set forth

[40] If this Court should extend the doctrine of the *Pottorff* and *Sneeden* cases, an anomalous condition will arise out of the misapprehension of law which existed among government officials and officials of national banks who believed that national banks possessed the power to pledge assets to secure deposits of governmental moneys. Should this Court hold this administrative interpretation incorrect, it follows that although the receiver did not know that he took possession of a trust fund, nevertheless his ignorance of his legal position would not excuse him from the conversion of the trust *res* coming into his hands.

in Point I of the petitioners' brief in that case, we submit that the pledge to secure these deposits was valid.

The question whether the United States is a necessary party to this suit, in so far as it relates to Canal Zone money-order funds, is discussed in the brief of the petitioners in *Woodring* v. *Wardell*, No. 5, this Term, and we respectfully submit that, for the reasons set out in Point II of that brief, this suit must be dismissed as to petitioners Woodring and Smith.

While the question of whether the United States is a necessary party, in respect of the claims against the Inland Waterways and the Fleet Corporation, was preserved in the petition in the instant case, we do not urge that question here.

CONCLUSION

It is respectfully submitted that the decision of the court below is incorrect and should be reversed.

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SEPTEMBER 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 629

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, and H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL,

Petitioners

vs.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., a Corporation,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT CARY A. HARDEE, IN OPPOSITION

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INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, and H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL,

Petitioners

vs.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., a Corporation,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENT CARY A. HARDEE, IN OPPOSITION

The petition for the allowance of a writ of certiorari in this case is presented on behalf of (a) the United States Shipping Board Merchant Fleet Corporation, (b) the Inland Waterways Corporation,

and (c) Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Agent and Chief of the Washington Office, Panama Canal, to review a decision of the Court of Appeals of the District of Columbia in favor of the Receiver of the Commercial National Bank of Washington, who sued to recover the proceeds of certain bonds pledged to secure payment of deposits in that bank of funds of the Merchant Fleet Corporation, Inland Waterways Corporation and the Panama Canal.

The petition is not accompanied by a supporting brief and in the reasons for granting the writ petitioner relies chiefly on the reasons assigned in another case, No. 628, in this Court. The case referred to deals solely with a petition filed on behalf of Harry H. Woodring and H. A. A. Smith, and is confined to the right of recovery of the proceeds of bonds pledged to secure repayment of deposits made by the Panama Canal in the District National Bank of Washington.

There is a substantial difference in the principles upon which respondent bases his right to recover in the cases in which the Merchant Fleet Corporation and the Inland Waterways Corporation are sued, and the case against Harry H. Woodring and H. A. A. Smith. The difference readily appears from the examination of the opinion of the court below (R. 106-122, inc.) which deals exhaustively with each case. The frame of the petition in this case proceeds on the assumption that there is no substantial difference in the cases of the Fleet Corporation, the Waterways Corporation, and the Panama Canal.

We shall point out subsequently the differences between the status of the United States Merchant Fleet Corporation and the Inland Waterways Corporation from that occupied by the two petitioners acting on behalf of the Panama Canal.

Opinions below and Jurisdiction of the Court

The statements set forth on page 2 of the petition for certiorari of the opinions below and of the statute under which the jurisdiction of this court is invoked are correct.

STATEMENT

The Statement of Facts found in the petition on pages 3, 4, 5, 6 and 7 correctly sets forth the details in connection with the making of the deposits, the pledging of assets of the bank to secure the deposits, the subsequent action of the two corporations in selling the bonds pledged with them, the action of the General Purchasing officer of the Panama Canal in taking over the bonds pledged to secure the Panama Canal deposit, as well as the bringing of the suit in the District Court and the decree there entered and its affirmation by the Court of Appeals for the District of Columbia.

We shall have occasion, however, in our discussion of the questions presented by the petition to supplement this recital by additional facts relevant to the questions at issue.

QUESTIONS PRESENTED

Petitioners urge only two questions of law as a basis for granting certiorari (see page 3 of petition),

though in a footnote it is stated that a third question will be submitted in the event that certiorari is granted. The two questions set forth in the petition are:

(1) Whether the pledges to the various petitioners were legal, and

(2) Whether the United States is an indispensable party defendant.

ARGUMENT

I

No Novel Question is Raised by the Petition for Writ of Certiorari nor Has It Been Shown that the Decision of the Court Below Is in Conflict with Any Decision of This Court or of Any Circuit Court.

Before entering upon our argument on the merits as to these two questions, attention of the Court is invited to the fact that so far as the Merchant Fleet Corporation is concerned, this petition is a second attempt to have this court review these identical questions. In *O'Connor* v. *Rhodes*, 296 U. S. 568 the Merchant Fleet Corporation sought a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia, in which that Court had held that the pledge of bonds by the Commercial National Bank to secure the deposits of the Merchant Fleet Corporation was illegal and void, and that suit could be brought for the recovery of the proceeds from the sale of such bonds without the United States being a necessary party. This ruling by the Court of Appeals was upon the identical facts here presented. The exact argument

now made was then made, and, this Court denied certiorari.

We shall have occasion to show that the position of the Inland Waterways Corporation is identical with that of the Fleet Corporation, and there is obviously no more reason for granting certiorari to the Inland Waterways Corporation than to the Fleet Corporation.

The position of H. H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Agent and Chief of the Washington Office, Panama Canal, in connection with the pledge to secure deposits of the Panama Canal funds differs from that of the corporate petitioners in that it involves consideration of certain acts and regulations of the Canal Zone which, of course, have no relationship to the other petitioners, and also because the Canal Zone is not an incorporated entity.

Without regard to any differences in the status of any of the petitioners, it is respectfully urged that all of the arguments advanced represent simply an effort to obtain a reversal of principles of law definitely settled by decisions of this Court and followed repeatedly by the various circuit courts. It is clear that neither of the questions raised by the petitioners can be considered in any way novel, nor have the petitioners pointed to any conflict of decisions of the various circuit courts. There is no basis for granting the writ.

II

The Pledges Are Illegal and Void

In *Texas and Pacific Ry.* v. *Pottorff*, 291 U. S. 245 and in *City of Marion* v. *Sneeden*, 291 U. S. 262, this

court held that a national bank had no power to pledge its assets to secure either a public or a private deposit, unless authorized or required to do so by an appropriate act of Congress.

In *Texas & Pacific Ry.* v. *Pottorff*, *supra*, this court said:

> "National Banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied."

Similarly in *City of Marion* v. *Sneeden*, *supra*, it was said:

> "For the reasons stated in *Texas & Pacific Ry. Co.* v. *Pottorff*, No. 128, decided this day (291 U. S. 245, *ante*, 777, 54 S. Ct. 416), we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States."

This rule was followed by the court below both in the instant case and in *O'Connor* v. *Rhodes*, 79 Fed. (2d) 146, which latter case as we have stated involved the same facts as to the Merchant Fleet funds as now presented and as to which *certiorari* was denied. It has also been followed by all of the circuit courts in which the question has been presented, and *certiorari* has been consistently denied by this court. See:

Leonard v. *Gage*, 94 Fed. (2d) 19, (C.C.A. 4th Cir.) cert. den. 82 L. Ed. Adv. Op. 641.
Hood v. *Hardesty*, 94 Fed. (2d) 26, (C.C.A. 4th Cir.) cert. den. 82 L. Ed. Ad. op. 748.
City of Ft. Worth v. *McCamey*, 93 Fed. (2d) 964, (C.C.A. 5th Cir.) cert. den. 82 L. Ed. Ad. Op. 1038.

City of Chicago v. *Joseph*, 95 Fed. (2d) 444 (C.C.A. 7th Cir.) cert. den. 82 L. Ed. Ad. Op. 1043.

Queenan v. *Mays*, 90 Fed. (2d) 525, (C.C.A. 10th Cir.) cert. den. 302 U. S. 734.

Nelson v. *Lewis*, 73 Fed. (2d) 521, (C.C.A. 2nd Cir.).

Buckley v. *South Western National Bank*, 88 Fed. (2d) 263, (C.C.A. 3rd Cir.).

Griffin v. *Royall*, 70 Fed. (2d) 103, (C.C.A. 4th Cir.).

Webb v. *American Surety Co. of New York*, 88 Fed. (2d) 171, (C.C.A. 5th Cir.).

Granzow v. *Village of Lyons*, 89 Fed. (2d) 83, (C.C.A. 7th Cir.).

LaPerr v. *City of Rockford*, 100 Fed. (2d) 563, (C.C.A. 7th Cir.).

Redfield Independent School District v. *Schnetzer*, 94 Fed. (2d) 257, (C.C.A. 8th Cir.).

Utter v. *Eckerson*, 78 Fed. (2d) 307, (C.C.A. 9th Cir.).

The petitioners contend, however, that the pledges were legal because: (a) made in "substantial" conformity with the provisions of Section 90 of Title 12, U. S. C.; (b) because made in accordance with an alleged long established custom and usage; and (c) because of certain acts of Congress, regulations and orders of the Canal Zone dealing with the administration of the Canal Zone. It is obvious that the third reason relates to the Canal Zone only.

The pledges were not made in substantial conformity with the provisions of Section 90, Title 12 U.S.C.

A reading of Section 90, Title 12, U. S. C. as well as what was said by the court below in the Rhodes case shows that for a pledge to have been legally made under that section, it must be shown: (a) that

the deposits were public money of the United States; (b) that the bank was a designated depository; (c) that the deposit was made by direction of the Secretary of the Treasury and subject to his check or control; and (d) that the pledge was made to the Secretary of the Treasury. The record is clear that none of these requirements were met in the instant case and in fact petitioners do not seriously contend that three of the four requirements were met. There is no dispute that the bank was not a designated depository (R. 43, 90); that the deposits were not made by the Secretary of the Treasury, but by the Fleet Corporation (R. 43), the Inland Waterways Corporation (R. 74) and the Secretary of War (R. 6), respectively, and consequently were not subject to the check or control of the Secretary of the Treasury; nor is there any question that the securities in question were exacted by the Merchant Fleet Corporation, the Inland Waterways Corporation, and the Secretary of War, and not by the Secretary of the Treasury.

In view of the fact that three of the four requirements of Section 90, have not been met, it would seem obvious that the pledges were not made in conformity with this section regardless of whether or not the deposits were of public money.

However, it is believed that the record clearly shows that none of the funds in question were public money of the United States and for this reason also it is clear that Section 90 has no application whatsoever. (See opinion of court below, R. 106 *et seq.*) As to the Canal Zone, it has never before been argued and *was not plead* that the funds involved were public money of the United States. The record clearly

shows that the funds are moneys of the Canal Zone, consequently not public money of the United States, and this was admitted in the answer. (R. 90.)

In view of these facts, it is clear that the court below was quite correct in holding that these pledges could not be considered as authorized by Section 90 of Title 12 U.S.C.

Neither custom nor usage can authorize the pledges.

The suggestion that lack of satisfactory authority may be supplied by an alleged custom and usage needs no discussion. This precise point was decided contrary to the contention of petitioners by this court in *City of Marion* v. *Sneeden, supra*, and has been followed in the decisions of various circuit courts.

City of Fort Worth v. *McCamey*, 93 Fed. (2d) 964

Leonard v. *Gage*, 94 Fed. (2d) 19

Maxwell and Porter, et al. v. *Tarrant County Water Control and Improvement District*, Nos. 650 and 645 in Equity, the District Court of the United States for the Northern District of Texas, Fort Worth Division.

No statutory authority as to pledges made to officials of the Canal Zone.

In addition to the contentions previously discussed, it is argued that circulars, regulations and acts of the Canal Zone coupled with acts of Congress relating to the government of the Canal Zone can be construed so as to authorize the plege given to secure Canal Zone deposits.

An examination of these various enactments shows that they fall far short of the necessary statutory au-

thorization required in view of the Pottorff and Sneeden decisions. The opinion of the court below contains a complete analysis of the various orders, regulations and statutes involved, and correctly holds that authority for the pledge cannot be read into these various enactments. The court below in line with the decision of this court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559 found a complete absence of any act of Congress specifically authorizing the taking of security in connection with Canal Zone funds.

In the *Lewis case, supra*, it was said at page 564:

> "In *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, *ante*, 777, 54 S. Ct. 416, and *Marion* v. *Sneeden*, 291 U. S. 262, *ante*, 787, 54 S. Ct. 421, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

Petitioners in their petition in case No. 628 now refer to circular Nos. 660-2 issued from the office of the Governor of the Canal Zone on April 1, 1914, which is not in the record and was not mentioned by petitioners in their brief below. Petitioners contend that the provisions of this circular, when considered with the provisions of the Congressional Act of August 21, 1916, must be considered as specific authority for the pledge.

The vice of this argument lies both in the interpretation given to the circular itself and of the Act of 1916. The circular related to contracts that had been entered into by the Secretary of War under an assumption (now by virtue of decisions of this court

declared erroneous) that National banks had the right to secure deposits such as those relating to Canal Zone funds, and is no more than a direction to officials to deposit in banks with which such contracts were had. It cannot be construed of itself to be a requirement for the taking of security. As stated, it simply recognizes an existing condition wrongfully assumed to be a warranted one and does not bring into existence any requirement, whether warrantable or not, that deposits of Canal Zone funds *must be secured*. The 1916 Act of Congress likewise does not undertake by affirmation or otherwise to require the giving of security in connection with deposit of Canal Zone funds. In point of fact, it by its terms relates only to the disposition of interest paid on account of such deposits. The contention that the circular of April 1, 1914 plus the subsequent Act of Congress, August, 1916, is such a *specific statutory requirement* for the taking of security for such deposits as to avoid the National Banking Law forbidding preferences is in our judgment without warrant.

Hence, it is clear that as to all three petitioners no authority existed for the pledge of assets and that the respondent herein is entitled, as held by the court below, to recover his property.

III

The United States Is not an Indispensable Party

The other question presented in the Petition for Certiorari is whether or not the suit is in effect a suit against the United States.

As to Inland Waterways, and Merchant Fleet Corporation.

This point was disposed of, as we have stated, as to the Merchant Fleet Corporation by the decision in

the Rhodes case which is also directly applicable to the Inland Waterways Corporation. Both the Merchant Fleet Corporation and the Inland Waterways are expressly given the power to sue and be sued, and being governmental corporations engaged in functions which are not strictly governmental but in most respects commercial, there can be no question that they are subject to suit just as a private corporation. See, *Sloan Shipyard* v. *U. S. Fleet Corporation*, 258 U. S. 549; *U. S. ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1; *Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519; *Lindgren* v. *U. S. Shipping Board Merchant Fleet Corp.*, 55 F. (2d) 117.

In *Sloan Shipyard* v. *U. S. Fleet Corporation*, 258 U. S. 549, it was said:

> "* * * The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."

Also in *U. S. ex re. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, the court said:

> "* * * Being a private corporation, the Fleet Corporation may be sued in the State or Federal Courts like other private corporations."

In the case of *Keifer & Keifer* v. *Reconstruction Finance Corporation, et al.*, No. 364, decided February 27, 1939, this Court dealt at length with the question of Governmental corporations' immunity from suit and held that such corporations even

though not expressly given the power to sue and be sued, were subject to suit both in contract and in Tort unless Congress had expressly provided to the contrary.

As to H. H. Woodring, Secretary of War and H. A. Smith, General Purchasing Agent and Chief of the Washington Office, Panama Canal.

In determining respondent's right to recover his property which is held unlawfully by Government officials, the distinction between the deposits made in the bank and the proceeds of the illegally pledged bonds must be kept in mind. It is, of course, clear that the pledge being illegal *the bonds were never the property of the pledgees or of the United States* but remained always the property of the bank and consequently the recovery of the bank's property can in no way affect the United States which has no right to said property, and *at no time has had possession of the pledged bonds or their proceeds.* Because of the foregoing, it is submitted that the cases cited by petitioners on page 10 of their petition in case No. 628 are not in point.

Inasmuch as this action is brought to recover assets of the bank, and therefore does not relate to the character of the deposits made by the officials of the Panama Canal, the United States is not a necessary party to this action for the recovery of the insolvent bank's illegally pledged assets or their proceeds.[1] This

[1] Even if there were any warrant for disregarding the fact that the suit is one for the recovery of property of the bank, the fact that the United States may ultimately have to bear a loss suffered by the petitioners as to their deposits cannot be considered as making it a necessary party. In the Sloan case, *supra*, this Court, notwithstanding the elaborate argument of counsel for the Fleet Corporation that any loss suffered by the Fleet Corporation would have to be borne by the United States, held that the suit could be maintained and the United States was not a necessary party.

conclusion is predicated upon a careful consideration and analysis of this question by the Supreme Court of the United States in *Tindal* v. *Wesley*, 167 U. S. 204; *United States* v. *Lee*, 106 U. S. 196; *Osborne* v. *Bank*, 9 Wheaton 738, and other cases of similar import determined by the Supreme Court.

In *Tindal* v. *Wesley*, 167 U. S. 204, 221, the court said:

> "We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this Court in *United States* v. *Peters*, 5 Cranch, 155, 139: 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the Government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the State, nor one in which the plaintiff seeks to compel the specific performance by the State of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the State."

In *United States* v. *Lee*, 106 U. S. 196, the court, in holding that a plea of sovereign immunity on behalf of the United States was not well taken, and that the United States was not an indispensable party, said:

> "This examination of the cases in this Court establishes clearly this result: that the proposi-

tion that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion, that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, *Brown* v. *Huger*, and *Grissar* v. *McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

Nor is there anything in the decision of *Cummings* v. *Hardee*, decided by the U. S. Court of Appeals for the District of Columbia on January 23, 1939 in any way in conflict with this doctrine, since in that case the court found that the proceeds of the illegally pledged bonds had come into the possession of the United States by being covered into the Treasury and were subject to the constitutional provision that money covered into the Treasury cannot be withdrawn without an Act of Congress. Since the Court held that there was no statute authorizing the payment out of the proceeds of the bonds, the fact that they were covered into the Treasury made recovery by the Receiver impossible. It will be noted that the court very carefully distinguishes that case from

the instant case as well as from the Rhodes case, and pointed out that where the property was unlawfully in the hands of a Government official and subject to his control, it could be recovered.

Form of Decree

Petitioners urge in their argument in No. 628 that the form of the decree entered by the court below was erroneous since it was in substance merely a money judgment rather than in the form of a decree for restitution of the proceeds of the bonds. The form of the decree resulted from the circumstances that the bonds had been sold, that the sales were numerous, and adjustments were required by way of credit to petitioners (defendants there) for dividends as of the date of the payment thereof and in consequence computations were made accordingly. Hence the decree was entered with "no objection to the form" on the part of petitioners (defendants) (R. p. 101). The decree could have directed restitution of the bond proceeds less dividend credits. The money judgment simply represents the equivalent of the net liability of the petitioners to account to respondent as prayed in the bill.

CONCLUSION

There being no novel question involved in this case and the decision of the lower court being in strict accord with applicable decisions of this Court, it is submitted that the petition on behalf of Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washing-

ton Office of Panama Canal, for a writ of certiorari to the United States Court of Appeals for the District of Columbia, be denied.

Respectfully submitted,

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February, 1939.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 6

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, *Petitioners*,

v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

BRIEF FOR THE RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 6

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, *Petitioners*,

v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The judgments of the District Court were entered without an opinion (R. 97-101). The opinion of the United States Court of Appeals for the District of Columbia (R. 106-121) is reported in 100 F. (2d) 678.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 31, 1938 (R. 121). The petition for a writ of certiorari was filed on

January 31, 1939, and was granted on March 13, 1939 (R. 123). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Pursuant to contracts with the Commercial National Bank, the Secretary of War on behalf of the Canal Zone, the Inland Waterways Corporation and the United States Shipping Board Merchant Fleet Corporation, the petitioners herein, opened various deposit accounts in the Commercial National Bank, the Bank pledging certain of its assets to secure these deposit accounts. Because of these contracts, upon insolvency of the Bank, these petitioners received full payment of their deposit balance with interest either by taking over the security, as in the case of the Canal Zone officials, or from the proceeds of the sale of such securities. The respondent's predecessor in office as Receiver of the Commercial National Bank assailed the validity of the pledge agreements, and brought this suit to recover the pledged securities or their proceeds, giving credit to the various petitioners for the amount which they would be entitled to receive as general creditors of the Bank.

Two questions are urged by petitioners as grounds for reversal:

(1) Was the giving of security by the Commercial National Bank invalid?

(2) As to the Canal Zone deposit, is the United States an indispensable party defendant?

A third question is suggested in petitioners' brief, though it is not urged as a ground for reversal, and was not urged as a basis for this Court's granting certiorari. This suggestion relates only to the Merchant Fleet Corporation and the Inland Waterways Corporation, and may be stated as follows:

(3) Were the deposits of the Merchant Fleet and the Inland Waterways illegally received by the Commercial National Bank, thereby giving rise to a constructive trust?

STATUTES INVOLVED.

The applicable portions of the statutes involved are set forth in respondent's separately printed Appendix.

STATEMENT.

This case arose upon an amended Bill of Complaint (R. 1-28) filed by the Receiver of the Commercial National Bank on June 4, 1936, against the petitioners herein and other allegedly illegally secured depositors not here involved, alleging that the pledge by the Commercial National Bank to the Secretary of War to secure deposits of Canal Zone funds made in the Bank, the pledge to the Inland Waterways Corporation to secure deposits of its funds in the Bank, and the pledge to secure deposits of the Merchant Fleet Corporation, petitioners herein, were illegal and void; that the pledged bonds or their proceeds were held in trust by the various pledgees, and seeking a recovery either of the pledged bonds or their proceeds. Separate answers were filed by each of the petitioners.* Motions were made by the respondent to strike certain defenses, and for the entries of decrees *pro confesso* against the petitioners (R. 93-96). The District Court granted the motions (R. 97-101) and the Court of Appeals for the District of Columbia affirmed the judgments of the District Court (R. 21), whereupon petitioners applied to this Court for a Writ of Certiorari, which was granted.

For the sake of clarity, this brief has been divided into two parts; the first deals with the pledge

* United States Shipping Board Merchant Fleet Corporation (R. 29-73, including Exhibits); Inland Waterways Corporation (R. 73-80); Harry H. Woodring, *et al.*, (R. 82-92).

of assets securing deposits of the Canal Zone funds, and the second part deals with the pledges of assets securing the deposits of the Merchant Fleet Corporation and the Inland Waterways Corporation. Much that is said in relation to the pledge securing the deposit of the Canal Zone is equally applicable to the pledge securing the deposits of the other two petitioners, and is not repeated in the second part of the brief, but is simply indicated by cross reference.

Because of the division of the brief, it is thought desirable at this point simply to summarize the facts as to the Canal Zone deposits, and subsequently, in that section of the brief dealing with the Merchant Fleet Corporation and the Inland Waterways Corporation, a statement of facts as to these two corporations is made (pages 53 to 59).

SUMMARY OF FACTS AS TO THE CANAL ZONE DEPOSITS.

Pursuant to an agreement dated January 19, 1909, between the Government of the Canal Zone and the Commercial National Bank, various sums were deposited by Canal Zone officials in the Bank. On March 1, 1910, there was on deposit with the Bank under this agreement the sum of $1,254,754.92 (Ex. C-1. R. 17-18).

On May 11, 1910, an agreement "in renewal and amendatory" of the original agreement of 1909 was entered into between the Secretary of War, as the executive officer of the United States having supervision and control over the governmental affairs of the Canal Zone and the Commercial National Bank. This agreement provided for the deposit by the Bank of bonds of the par value of $1,294,000.00 with the General Purchasing Officer of the Isthmian Canal Commission as security for the safekeeping and prompt payment of the funds deposited under the agreement of the Canal Zone officials. Said agreement further provided that the Bank would maintain at all times acceptable bonds in such amounts that the deposits would be fully secured, and that

the Bank should have the right as deposits were withdrawn to withdraw its bonds correspondingly, and at any time substitute other acceptable bonds of equal market value for bonds then pledged.

On May 1, 1911, in accordance with the contract of 1910, the Secretary of War opened a deposit account in the Commercial National Bank and the Bank pledged with the Secretary of War by delivery to his subordinate officer the General Purchasing Officer and Chief of the Washington Office, The Panama Canal, various and sundry bonds of an aggregate par value of $791,000.00 (R. 6, 83).

The Commercial Bank was not designated by the Secretary of the Treasury as a depositary of funds of the Government of the Canal Zone (R. 43, 90) and the Secretary of the Treasury did not exact the pledge, but the Secretary of the Treasury was consulted by the Secretary of War and approved the deposit of Canal Zone funds in the Commercial Bank and the Secretary of War's proposal to take security for said deposits (R. 90).

On February 27, 1933, when the Bank suspended operations, the credit balance on deposit in the Canal Zone account was $711,622.92 (R. 6), and consisted of deposit money order funds and money order funds (R. 84).

After the suspension of the Bank, the Secretary of War, on June 16, 1933, directed the General Purchasing Officer and Chief of Washington Office, The Panama Canal, to take over the bonds which secured the deposits (Ex. C-3. R. 21-22) and, acting under a mistake of law, the Receiver of the Bank consented to the taking over of said bonds as aforesaid. The original bill of complaint in this suit was filed on July 9, 1935, and on June 4, 1936, an amended bill of complaint was filed. The answer of the Secretary of War and the Canal Zone officials was filed October 31, 1936. There is no denial in the answer that the bonds are held by the present Secretary of War and the present General Pur-

chasing Officer and Chief of the Washington Office, but it is denied that they are held in trust (R. 83).*

SUMMARY OF ARGUMENT AS TO THE CANAL ZONE DEPOSITS.

I.

National banks have no general or implied power to pledge their assets to secure deposits of Federal funds, but can pledge their assets only when authority so to do has been specifically provided for by an act of Congress.

There is no act of Congress which authorized the Commercial National Bank to secure the deposits of Canal Zone funds made by the Secretary of War or which required the Secretary of War to exact security as a condition precedent to such deposits.

Section 45 of the National Bank Act is expressly limited to securing deposits of public money of the United States made by the Secretary of the Treasury in depositories designated by him pursuant to regulations of the Treasury

* It will be noted that in this particular, the instant case on its facts differs from case No. 5, *Woodring, et al.*, v. *Wardell*, since in the Wardell case it appears that the illegally pledged bonds were sold to the Hamilton National Bank and the proceeds credited to a new deposit account in that bank in the name of the Secretary of War Canal Zone funds. We are advised by the Panama Canal officials, in connection with the disposition of the bonds pledged by the Commercial National Bank to the Secretary of War, that of the bonds originally pledged by the bank on July 1, 1935, proceeds had been realized from the sale of the bank's bonds to the extent only of $154,855.78. On July 1, 1935, the Canal Zone officials accepted $220,000.00 face value bonds in exchange for bonds of an equivalent value and character which had matured as to payment. Thereafter, in 1936, bonds of the face value of $70,000.00, which had likewise matured, were accepted in exchange for bonds of equivalent value and character for payment. On May 1, 1937, the remainder of the bonds which had been originally pledged by the bank to secure Canal Zone deposits were sold by petitioners for the sum of $290,000.00. The instant case is therefore simply a suit to recover possession of property or its proceeds, alleged to be unlawfully held by petitioners.

and has no application to deposits of Canal Zone funds since they are not public money of the United States. Nor has there been any compliance with this section of the National Bank Act.

There is nothing in the Congressional Act of 1916 or in either the Circular of 1914 or 1923 issued from the Governor of the Canal Zone's office which authorized or required the taking of security upon deposits of Canal Zone funds. Such authority cannot be implied by considering the circulars and the statute together.

Inasmuch as the Canal Zone postal saving system was abolished in 1914, the Congressional Act of 1933 did not extend provisions of the United States postal savings system to the Canal Zone, and in any event there was no compliance with the terms of any provisions of the United States postal savings system relative to the securing of deposits.

Lack of specific statutory authority cannot be supplied by administrative practice no matter how consistent or how long continued.

II.

The pledge, being unauthorized, was void, and neither the pledgees, the Canal Zone nor the United States acquired any right or interest in the illegally pledged bonds or the proceeds thereof, which at all times remained the property of the bank.

Petitioners seek to justify retention of respondents' property on the ground that the United States and the Canal Zone are indispensable parties because petitioners hold the property as officials of the Government. To sustain this defense petitioners must show that their holding on behalf of the Government is lawful and this they have been unable to do. Therefore, the Court may order the petitioners, as individuals unlawfully in possession, to return respondents' property.

III.

The deposit of Canal Zone funds in the Commercial National Bank was legal, creating a debtor-creditor relationship and not one of trustee and cestui que trust, and in any event this question was not raised by the petitioners in their answer, in their brief in the District Court or on appeal. Nor was it urged as a basis for this Court's granting certiorari. Therefore, this question is not now before the Court.

IV.

The allowance of interest as awarded in the judgments below, while not assigned as error or argued below or in the petition for certiorari, was proper as a matter of law.

ARGUMENT AS TO THE CANAL ZONE DEPOSITS.

I.

National Banks Have No Power to Pledge Their Assets to Secure Deposits Unless Specifically Authorized by an Act of Congress.

The National Banking Act is a complete code in itself for the operation of national banks. The only powers which national banks have are the powers set forth in the Act or subsequent Acts of Congress.

The extent of the powers of national banks was before this Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 253, where the Court said:

> "National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and *powers not conferred by Congress are denied.* For the Act under which national banks are organized constitutes a complete system for their government, *Cook County National Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362, 366; *First National Bank* v. *Missouri*, 263 U. S. 640." (Italics supplied.)

In spite of the clear statement by this Court in the Pottorff case, supra, that national banks have only such power as is expressly conferred by Acts of Congress, petitioners contend that there is an inherent power in national banks to pledge assets to secure deposits of public money of the United States and that money in the possession of a federal officer or agency is public money of the United States as to which said officer or agency in their discretion may legally require any national bank to pledge its assets to secure deposits of such money.

The basis for petitioners' contention is that Section 8 of the National Bank Act (12 U. S. C., sec. 24) confers such powers upon national banks as are incidental to doing a banking business and that Section 45 indicates a policy on the part of Congress looking to the securing of deposits of public money of the United States, which policy petitioners contend developed as a result of the Government's experiences with deposits of the public money in the Bank of the United States, state banks, and sub-treasuries, prior to the creation of national banks. Therefore, petitioners claim that Section 8, read in the light of Section 45, grants to national banks an implied power to pledge their assets to secure the deposit of all public money of the United States, regardless of whether or not the pledges are made under Section 45.

A similar argument was advanced in the Pottorff case, supra, and in rejecting it this Court at page 257 said:

> "The Railway insists that the Congress in providing that the Secretary of the Treasury might deposit public money in national banks upon receiving satisfactory security by 'the deposit of United States bonds or otherwise,' Act of June 3, 1864, c. 106, Sec. 45, 13 Stat. 113, assumed a general power in national banks to pledge their assets to secure deposits; and that the assumption indicates that it intended this power to be among the 'incidental' powers granted by Sec. 8.
>
> ". . . We may not import into Sec. 8 a meaning not derivable from the words of that section and inconsistent

with other provisions of the Act. Moreover, if the Railway's argument were sound it would have been unnecessary to amend Sec. 45 as was done by the Act of June 25, 1930. . . .

"This amendment indicated that Congress believed that the original Act *had not granted general power to pledge assets to secure deposits.* The fact that the amendment was made to Sec. 45 indicates that the power to pledge was granted only as an incident of the public officer's duty to demand a pledge." (Italics supplied.)

In *Marion* v. *Sneeden*, 291 U. S. 262, this Court made it clear that national banks had no general, incidental or implied power to pledge assets because of Sec. 45 of the Act or because of the federal statutes specifically authorizing the securing of particular deposits. At page 268 in its opinion this Court said:

"For the reasons stated in Texas & Pacific Ry. Co. v. Pottorff, decided this day [ante, page 245] we are of opinion that the Act of 1864 did not confer the power to pledge assets *to secure any public deposits* except those made under Sec. 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to *securing specific federal funds.*" (Italics supplied.)

In *Lewis* v. *Fidelity & Deposit Company of Maryland*, 292 U.S. 559, this court again had before it the question of the power of national banks to give security for deposits. That case involved the securing of deposits of public funds of the state of Georgia and the Circuit Court of Appeals for the 5th Circuit ruled as a matter of federal law that national banks had, under the National Banking Act of 1864, implied power to pledge assets to secure public deposits. This court declined to follow the decision of the Court of Appeals on this point and at page 564 of its decision, stated:

"In Texas & Pacific Ry. Co. v. Pottorff, 291 U.S. 245, and Marion v. Sneeden, 291 U.S. 262, decided after the

entry of the judgment below, we held that a national bank had prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits *specifically provided for* by Acts of Congress. It follows that, in 1928, no lien arose when the bank was appointed depository; and *that the judgment of the Circuit Court of Appeals must be reversed* unless the Act of June 25, 1930, c. 604, 46 Stat. 809, authorizes a national bank to give as security a general lien of the character prescribed by the Georgia statutes." (Italics supplied).

Petitioner seeks to escape the effect of the Pottorff and Sneeden cases by stating that these cases dealt with "the private aspect" of national banks. We submit that the Pottorff, Sneeden and Lewis cases deal with *the power* of national banks and that their language leaves no doubt that the power which petitioners contend exists by implication is totally lacking. These cases definitely establish the fact that national banks have no power to pledge assets to secure federal deposits unless there has been an Act of Congress specifically authorizing a pledge or requiring the officer making the deposit to exact a pledge.

Petitioners cite no authority to the contrary, but contend that as a result of losses suffered because of a failure to secure deposits in state banks, it became the settled policy of the Government to require security for all deposits of public money and that since the chief purpose of the National Bank Act was to provide a nation-wide system of banks to serve as Government depositories, it must be assumed that such banks have inherent power to pledge their assets to secure all deposits of money in which the Government has an interest.

This view ignores other purposes sought to be accomplished by the framers of the National Bank Act, and disregards the actual plan adopted touching the use of such banks as Government depositories. One of these objectives was to protect the citizens' money by raising banking

standards so that private depositors might have available under a federal law banks in which they could have confidence, and be assured of impartiality of treatment in the event of distress overtaking a bank. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 256.

The first of these ends was accomplished by providing that the Secretary of the Treasury might designate a National Bank as a depository for public money and require security for deposits of public money, it being left to his discretion what bank or banks should be so designated, the amount of deposits of public money to be permitted, and the extent and character of security to be taken.

The other of these two objectives was provided by the mandatory provision as to equality of treatment of all other depositors upon the happening of insolvency. Additional safeguards were provided, inspection and supervision of the bank by the Government, double liability of stockholders, and over all the securing against non-payment of the circulating bank notes authorized to be issued by the banks, by first a pledge of Government bonds and, second, a lien on all assets.

For this reason the National Bank Act, which is a complete code for the operation of such banks, does not grant any general power to pledge assets. The only pledges which the Act of 1864 itself permits or contemplates are pledges exacted and made to the Secretary of the Treasury to secure deposits of public money of the United States under his control, and if public money is deposited in a National bank designated as a Government depository, and insufficient security taken, the Government has no priority upon insolvency of the bank, but shares in its liquidation equally with other depositors. *Cook County National Bank* v. *United States*, 107 U. S. 445, 448.

There is no warrant in any of the historical facts recited by petitioners for a modification of the decisions of the Sneeden, Pottorff and Lewis cases, where this Court held specifically that national banks had no power to pledge their

assets to secure deposits, either public or private, unless expressly authorized so to do by appropriate Acts of Congress.

Deposits Made by Petitioners Were Not Public Moneys of the United States as the Term Is Used in Section 45 of the National Bank Act.

Section 45 of the National Bank Act (R. S. 5153, Sec. 90, Title 12, U. S. C.) is the only section of that Act which confers upon national banks any power to pledge assets to secure deposits. This section is set out in full in the appendix hereto at pages 4 to 5, and an examination of its provisions indicates that it is specifically limited to deposits of public moneys of the United States made by the Secretary of the Treasury in national banks designated by the Secretary as depositories of public money. Since the application of the section is limited to "public money," it is necessary to interpret that phrase and to consider the character of deposits here involved.

It is obvious that the various congressional enactments dealing with the public moneys of the United States can not be considered as isolated independent statutes complete in themselves, but must be read together as part of a general congressional plan looking to the proper receipt and custody of such moneys.

An examination of the various statutes dealing with the revenues of the United States indicates that the general plan of Congress was to have all money of the United States paid into the Treasury, subject to the control of the Secretary of the Treasury, and to the various safeguards which relate to money under the control of the Secretary of the Treasury and the Treasurer.

Money is covered into the Treasury under Section 147, Title 31, U. S. C.; R. S. 305 which provides:

> "The Treasurer shall receive and keep the moneys of the United States and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned

> in the General Accounting Office, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid."

In addition to this section there are many other specific provisions by which money of the United States is directed to be paid into the Treasury. Thus, Congress has provided that "the gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable * * *." (Sec. 484, Title 31, U.S.C.; R. S. 3617)

Similarly, the net proceeds from the sale of public property of any kind is required to be paid into the Treasury. (see section 487 of Title 31, U.S.C.; R. S. 3618 and section 489 of Title 31 U. S. C.)

Every disbursing officer having any public money entrusted to him for distribution must deposit same with the Treasurer or with one of the depositories of the United States. (Sec. 492, Title 31, U. S. C.; R. S. 3620.) Also every person who shall have moneys of the United States in his hands or possession, not required for current expenditure, shall pay the same to the Treasurer or some public depository of the United States, within 30 days of their receipt of same. (Section 495, Title 31, U. S. C.; R. S. 3621.)

After the money has been covered into the Treasury, it is subject to the control of the Secretary of the Treasury, or the Treasurer of the United States. The Secretary of the Treasury may either retain the money in the Treasury, or pursuant to Section 45, of the National Bank Act (Sec. 90, Title 12, U.S.C.) he may place it with National banks designated as depositaries, and require security therefor. The Secretary also may transfer the moneys from one deposi-

tary to another or from a depositary to the Treasury. (See section 522, Title 31, U. S. C.; R. S. 3640.)

All money paid into the Treasury is subject to the draft of the Treasurer (Sec. 526, Title 31, U. S. C.; R. S. 3644) and all public moneys paid into any depositary are also subject to the Treasurer's draft. (Sec. 474, Title 31, U. S. C.; R. S. 3593.)

Having provided a general plan for placing the money of the United States in the Treasury or a depositary designed by the Secretary of the Treasury and subject to the control of the Secretary of the Treasury or the Treasurer, Congress has placed definite restrictions and requirements upon the Secretary of the Treasury and the Treasurer to protect the public moneys under their control. It is provided under Section 147 of Title 31, U. S. C. (R. S. 305) that once money has been covered into the Treasury it can be disbursed only upon warrants drawn by the Secretary of the Treasury and countersigned in the General Accounting Office.

The Secretary of the Treasury is required annually on the 1st day of the regular session of Congress to lay before that body an accurate statement of receipts and expenditures during the last preceding fiscal year of all public moneys (Sec. 264, Title 5, U.S.C.). The Treasurer is required to render his account to the General Accounting Office quarterly or oftener if required. (Sec. 147, Title 31, U.S.C.; R. S. 305.)

This court had occasion to examine the various statutes relating to public money in *Coudert* v. *United States*, 175 U.S. 178, 182, and in that case public money as used in these statutes was defined as follows:

> "From these provisions it will be seen that the public moneys of the United States are the revenues of the United States from all sources, *and the gross amount received must first be paid into the Treasury.* (Secs. 3617 and 3618.) They are then subject to the draft of the Treasurer of the United States drawn agreeably to appropriations made by law. (Secs. 3593 and 3642. See also Sec. 3210.)" (Italics supplied).

Having established a definite plan for the safe keeping of public money, Congress has provided in the Criminal Code penalties which are designed to insure the carrying out of the plan. It will be noted that Sections 173, 174, 175, 177, 178, 179, 180 and 181 of Title 18 U.S.C. are intended to prevent persons having public money in their custody making unlawful deposits or use of such money. Section 182 supplements these sections, by making the person or bank who receives an unauthorized deposit of public money guilty of embezzlement, just as the person making the deposit is made guilty of embezzlement under the previous sections of this Title.

From the foregoing resume of the Congressional enactments dealing with public money of the United States, it is readily seen that Section 45 of the National Bank Act is but a part of the general statutory plan. The term "public money" is used in Section 45 in the same sense as in these other statutes and accordingly the money which may be secured under Section 45 is limited to public money under the control of the Secretary of the Treasury. Money in which the government may have an ultimate interest but which is not under the control of the Secretary of the Treasury is outside of the purview of Section 45.

If the petitioners' contentions are sound and the money received by them in the ordinary course of their activities is to be considered as "public money" of the United States such money would automatically become subject to the control of the Treasury Department and subject to all the restrictions and safeguards placed upon such moneys. An examination of the facts set forth in petitioners' answer clearly indicates that this was not the case and that the deposits cannot possibly be considered as public money within the meaning of that phrase as used in Section 45 of the National Bank Act and the related statutes dealing with the public moneys of the United States.

The money deposited by the Canal Zone officials was composed of money received by the postal service of the Canal Zone consisted of deposit money funds and money order funds. (R. 84) It is admitted in the answer of the Canal Zone officials that "The so-called Panama Canal funds are not public funds and are not part of the revenue of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of the United States." (R. 90)

In view of these admissions, as well as the other facts of record, it is obvious that the funds of the Canal Zone deposited in the Commercial National Bank had never been covered into the Treasury, and were not in any way subject to the control of the Secretary of the Treasury or the Treasurer of the United States, and therefore it is quite apparent that these deposits of Canal Zone funds cannot properly be considered as being "public money of the United States" within the meaning of Sec. 45 of the National Bank Act.

There Has Been no Compliance With the Provisions of Sec. 45 of the National Bank Act.

It was held by the Court of Appeals in *O'Connor* v. *Rhodes*, 79 Fed. (2d) 146, 150, that Section 45 of the National Bank Act (R. S. 5153) was personal to the Secretary of the Treasury and that to come within its requirements a pledge must meet the following requirements: (a) the deposit for which the pledge was given as security must be of public moneys of the United States; (b) the bank in which the deposits are made must have been designated as a depositary of public moneys by the Secretary of the Treasury; (c) the deposit must have been made by direction of the Secretary of the Treasury, and subject to his check or control; (d) the pledge must have been made to the Secretary of the Treasury.

While the Court of Appeals' construction of Sec. 45 was urged in the petition filed on behalf of Merchant Fleet Corporation and of the Attorney General as successor to the Alien Property Custodian for a Writ of Certiorari as being erroneous, this Court in the Rhodes case, 296 U. S. 568, granted the petitions for the writ *limited* to the question of the right of the respondent Rhodes to bring the suit without prior demand upon, and refusal by, the Comptroller of the Currency or the receiver, or both.

We believe that a reading of Section 45 clearly indicates the correctness of the construction placed upon it by the Court of Appeals both in the Rhodes case and in the instant case.

Since, as we have shown, none of the deposits involved consisted of public money of the United States, it is clear that none of the pledges was authorized by Sec. 45 of the National Bank Act. It is also apparent that Sec. 45 applies only to banks designated as depositaries of public moneys by the Secretary of the Treasury, and in the instant case it is admitted (see petitioners' brief Page 62, Note 32, and Page 67) that the Commercial National Bank was not so designated. (See also R. 43, 90).

It is clear that the foregoing primary requirements of the Section have not been met, and consequently there would be no basis for contending that the pledges were authorized by this section even if there had been a full compliance with the other provisions of the section, but an examination of the answer of the petitioners indicates that no single requirement of Sec. 45 has been met.

The contract between the Commercial National Bank and the Secretary of War pursuant to which these deposits and pledges were made, (Ex. C-1 R. 17) clearly shows that the deposit, and the pledges made pursuant thereto, were subject to the control of the Secretary of War and his subordinate officers, and in no way subject to the control of the Secretary of the Treasury or any official of the Treasury Department. The answer of the Canal Zone officials in-

dicates that the deposits were made by the Secretary of War, (R. 83), that the contract was between the bank and the Secretary of War, (R. 83), that the pledge and delivery of the bonds was to an official of the Canal Zone, (R. 83).

The appendix to petitioners' brief at pages 46-58 sets forth the correspondence preceding the pledge of assets here in question and petitioners contend that the correspondence between the Secretary of War and the Secretary of the Treasury constitutes substantial compliance with Section 45 of the National Bank Act. However, examination of the various letters indicates that the officials of the Canal Zone and the War Department did not consider the Canal Zone's funds as embraced by the provisions of the various public money statutes of the United States,* and no effort at compliance with Section 45 of the National Bank Act was intended or made.

A letter of September 19, 1908, by W. W. Warwick, Examiner of Accounts of the Canal Zone, to Lt. Col. George W. Goethals, Chairman of the Isthmian Canal Commission (set forth pp. 46-51 of appendix to petitioners' brief) states:

> "As the moneys of the Zone are not moneys of the United States, the laws regarding the designation of depositories of public money do not apply."

Similarly a letter dated October 21, 1908, from Chairman Goethals to the Secretary of War (set forth pages 51-52 of the appendix to the petitioners' brief) states:

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* This conclusion of the Canal Zone and War Department officials, was based upon an opinion of Comptrolier of the Treasury Tracewell given July 26, 1904, reported in 11 Decisions of the Comptroller of the Treasury at page 36 to the Chairman of the Isthmian Canal Commission, wherein the Comptroller, relying upon *Downes* v. *Bidwell*, 182 U. S. 244 and *Fleming* v. *Page*, 9 How. 603, 617, held that the Canal Zone was not covered by general Federal statutes, and concluded that "said Zone is not a part of the United States within the full meaning of the Constitution and laws of the Country."

"As noted in Mr. Warwick's letter, the monies of the Zone are not monies of the United States, so that the laws regarding the designation of depositories of public monies do not apply."

The correspondence with the Secretary of the Treasury was obviously simply for the purpose of obtaining the advice of the Secretary and in no sense was intended as any sort of compliance with Section 45, since the officials did not believe that Section 45 had any application to Canal Zone funds.

In view of these facts, it is quite clear that none of the requirements of Section 45 was intended to be met, and in fact none was met.

Pledge Not Authorized by the Congressional Act of 1916.

As we have shown under the decisions of this court in the Pottorff, Sneeden and Lewis cases, supra, in order to be valid, there must be a specific federal statute authorizing a national bank to make a pledge of its assets to secure deposits, or requiring a depositing officer to exact a pledge as a condition of the deposit. There is no statute expressly requiring the Secretary of War or any other officer of the Canal Zone to deposit Canal Zone funds in national banks and to exact security therefor, and there is no statute which grants to national banks the power to pledge assets to secure deposits of Canal Zone funds.

To meet this situation petitioners rely upon the Congressional enactment of 1916 which they contend ratified a regulation issued from the office of the Governor of the Canal Zone in 1914, which regulation it is claimed in effect ratified the contract entered into by the Secretary of War and the Commercial National Bank in 1910.

Petitioners also urge that because the deposits consisted in part of funds derived from the sale of Canal Zone de-

posit money orders and because Congress provided by an enactment in 1933 that the postal service of the Canal Zone should be governed by such laws, rules or regulations of the United States postal service as were applicable, authority existed for the pledge at least as to that portion of the deposits. We shall consider this latter contention hereafter.

By the Act of June 28, 1902, c. 1302, 32 Stat. 481 (Spooner Act), Congress authorized the President to acquire for the United States from the Republic of Colombia, perpetual control of a strip of land not less than six miles wide, extending from the Caribbean Sea to the Pacific Ocean. Under Sec. 7 of the Act the Isthmian Canal Commission was created in order to "enable the President to construct the canal and works appurtenant thereto".

The Act of April 28, 1904, c. 1758, 33 Stat. 429, authorized the President to take possession of the Canal Zone, and under Sec. 2 it was provided that until the expiration of the 58th Congress the power to make all rules and regulations necessary for the government of the Canal Zone should be vested in such person or persons and should be exercised in such manner as the President might direct.

On May 9, 1904, the President wrote to the Secretary of War stating that inasmuch as it was impractical for him personally to supervise and govern the Canal Zone, he was delegating the power to make all rules and regulations for the government of the Zone to the Isthmian Canal Commission, to be exercised under the supervision and direction of the Secretary of War. This letter is set out in full in the appendix, pp. 16-18, and delegates the power of making rules and regulations for the Canal Zone to the Isthmian Canal Commission. It gives the Secretary of War general supervisory powers over the acts of that Commission, but it does not give the Secretary of War any authority to adopt any rules or regulations for the Canal Zone except through the Isthmian Canal Commission.

A postal service was inaugurated for the Canal Zone on September 2, 1904, and a postal savings system for the Zone was established in 1914.* Between these two dates, on January 17, 1909, a contract was entered into between the Secretary of War and the Commercial National Bank providing for the deposit of Canal Zone funds in the Bank and a pledge by the bank to the Secretary of War to secure said deposits. Pursuant to this contract of 1909, as amended by an agreement of May 11, 1910 (Ex. C-1. R. 17-21) deposits of Canal Zone funds were made in the Bank and the pledge which is the subject of the instant suit was made to secure such deposits.

By 1912 there was a great deal of doubt as to the legality of various acts and regulations by which the Canal Zone had been governed. Accordingly, in 1912, Congress, by Sec. 2 of the Act of August 24, 1912, 37 Stat. 560, provided:

> "That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal, are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

While the section of the Act quoted above ratified and confirmed "all laws, orders, regulations and ordinances" in effect in the Canal Zone by authority of the President, *no claim is made by petitioners that at the time this Act was passed there was any law, order, regulation or ordinance authorizing or requiring the security of Canal Zone funds.* The Act further empowered the President to discontinue the Isthmian Canal Commission when he saw fit. It will be noted that this Act does not and could not ratify future laws, orders, regulations of ordinances of the Canal

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* The postal system of the Canal Zone is discussed in detail on pages 28 to 33 post.

Zone, though it does give legality to all such orders, regulations, etc., that had been adopted prior to 1912.

By Executive Order of January 27, 1914 (Appendix, pp. 23-24), the President terminated the services of the Isthmian Canal Commission and set up a permanent organization for the government of the Canal Zone.

On April 1, 1914, Circular No. 660-2 was issued from the office of the Governor of the Canal Zone which, while not in the record, is set forth in the appendix of petitioners' brief at page 25. Paragraph 3 of this circular provides*:

> "3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal."

As we have indicated, petitioners contend that the language quoted is a ratification of the contract entered into between the Secretary of War and the Commercial National Bank in 1910, and when considered with the provisions of

*There is nothing in the Record to show that this Circular was ever approved by the President of the United States, as required by the Executive Order of January 27, 1914, which is the only authority for the issuance of such Circulars, as admitted in footnote 19, page 27, of petitioners' brief, in the Wardell case, No. 5.

the Congressional Act of August 21, 1916, must be considered as specific authority for the pledge.

In the Act of August 21, 1916, c. 371, 39 Stat., 527, 528, Congress provided by Sections 6 and 7 . . .

> "Sec. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.
>
> "Sec. 7. That the interest received from the Canal Zone money order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service."

The vice of this argument lies both in the interpretation given to the circular itself and of the Act of 1916. The circular related to contracts that had been entered into by the Secretary of War under an assumption that National banks had the right to secure deposits such as those relating to Canal Zone funds, and is no more than a direction to officials to deposit such funds in banks with which such contracts were had. *It cannot be construed of itself to be a requirement for the taking of security.* As stated, it simply referred to an existing condition wrongfully assumed to be a warranted one and does not bring into existence any requirement, whether warrantable or not, that deposits of Canal Zone funds must be secured.

While the Governor's Circular, as we view it, does not specifically provide for the exaction of security, respondents submit that even though the Governor had enacted an express regulation which required depository banks to pledge assets to secure Canal Zone deposits, such a regulation, standing alone, would have been ineffective because Congress could only delegate to the President or

the Governor power to deal with questions local to the Panama Canal. It is obvious that Congress could not and did not delegate authority, to either the President, the Secretary of War or the Governor of the Canal Zone, to enlarge the powers of National banks of the United States to pledge their assets. If such purported authority had been given, it would have been an unconstitutional delegation of legislative power.

The Act of 1916 deals solely with the payment of interest on deposit money orders issued "in accordance with the rules and regulations" established by the President, and is not as broad as the Act of August 24, 1912, supra, which covered all laws, orders, regulations and ordinances. This Act does not undertake by affirmation or otherwise to require the giving of security in connection with deposit of Canal Zone funds. By its terms it relates only to the disposition of interest paid on account of such deposits. The contention that the circular of April 1, 1914, plus the subsequent Act of Congress of August, 1916, is such a specific statutory requirement for the taking of security for such deposits as to avoid the National Banking Law forbidding preferences and requiring ratable distribution of the bank's assets upon insolvency, is, in our judgment, without warrant.

Indeed, it is quite clear that the pledge was exacted by the Secretary of War upon the erroneous assumption that the bank had the power to make it and petitioners' entire argument on this point is simply an afterthought seeking to find a legal basis for this erroneous assumption.

Petitioners also cite what is known as Governor's Circular No. 660-61 of April 5, 1923, paragraph 4 of which provides:

> "Postal savings, money order, clubhouse and other trust and security funds received shall be remitted to depositors in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor. Tolls and other

revenues of the United States shall be deposited to the credit of the Treasurer of the United States in accordance with laws and regulations prescribed therefor, and any funds due the Panama Railroad Company in excess of currency transferred to the Paymaster shall be deposited to the credit of the Panama Railroad Company in local depositories."

This circular like the one of 1914 does not attempt to authorize the securing of Canal Zone postal savings or money order funds. It was adopted some 10 years after the Act of 1912, and some six years after the Act of 1916, and consequently cannot be considered to have been ratified by those Acts of Congress. Nor is there any Act of Congress subsequent to the adoption of this circular which ratifies regulations of the Governor of the Canal Zone.

Obviously, neither the circular of 1914 nor the one of 1923 meets the requirements of the Sneeden, Pottorff and Lewis cases which expressly hold that for a pledge to be legal there must be a specific Act of Congress either authorizing the bank to make the pledge or requiring the officer exacting the pledge to take security.

Petitioners rely upon *Berger* v. *Chase National Bank* (C.C.A. 2nd Circuit) decided July 24, 1939. In that case it appeared Congress had authorized the Philippine Commission to enact laws respecting the government of the Philippine Islands, which powers Congress subsequently vested in the Philippine legislatures. The Philippine Commission passed an Act permitting the Secretary of War of the United States to designate banking institutions in the United States as depositaries of the Government of the Philippine Islands, and this Act *specifically* required the Secretary of War to exact bonds from said depositary banks as security for the repayment of the Philippine deposits therein made.

This enactment remained in full force and effect until 1916, when the third Philippine Legislature adopted a similar provision of designation of depositaries, and the re-

quirement for the exaction of security for the repayment of deposits made thereunder. This provision was subsequently included in the Philippine Administrative Code of 1917, Section 625.

Further it appeared that under the so-called Autonomy Act of 1916, Section 6, Congress provided that "the laws in force in the Philippines on October 29, 1916, shall continue in force and effect, except as altered, amended, or modified by this chapter, until altered, amended or repealed by the legislative authority provided by this chapter or by acts of Congress of the United States."

The court held that by virtue of the Congressional Acts power was granted to the Philippine Commission and legislatures to make laws touching the government of the Philippine Islands, and the subsequent action of the Philippine Commission and Legislatures touching deposits of Philippine moneys, constituted authority to banks in the United States to pledge their assets to secure such deposits, and that if the court had entertained any doubt as to the correctness of such conclusion it was removed by the Autonomy Act of 1916, passed by Congress.

We think the decision in the Berger case is erroneous, since there was no Act of the Congress of the United States which specifically authorized or required the securing of the deposits of the government of the Philippine Islands, and Congress could not delegate to the Philippine Legislature authority to enlarge the powers of national banks in the United States, so as to enable them to pledge their assets to secure deposits of the Philippine government.

Further, we think the court in error in its conclusion that the Autonomy Act of 1916 validated the pledge. The Act of 1916 continued in force valid laws in effect in the Philippine Islands, and this court has held that Section 6 of the 1916 Act must be confined to laws local to the Philippines. *Posadas* v. *National City Bank*, 296 U. S. 497, 501.

But whether we are right in our judgment as to the Berger case having been wrongfully decided, we submit, in view of its facts, that it cannot be considered as determining the question here at issue.

In the instant case, unlike the Berger case, there is neither a *specific regulation authorizing or requiring the exaction of security*, nor is there an Act of Congress in existence which may be said to *ratify* any such specific regulation.

The Pledge Not Authorized by the Act of 1933.

As stated petitioners contend that, as to that part of the deposits which consisted of deposit money order funds, authority for the pledge may be found in the United States Postal laws which were extended to the Canal Zone by the Congressional enactment of February 16, 1933. Hence it is necessary to examine the U. S. postal laws to determine what application they have to deposits of Canal Zone deposit money order funds.

(a) United States Postal Laws prior to enactment of Postal Savings Act.

The original U. S. Postal Act had no provision for a postal savings system. A postal savings system was not established until the year 1910. Prior to that date, the law relative to securing postal revenues provided that such funds should be paid into the Treasury of the United States, or a depositary designated by the Secretary of the Treasury. (See 5 U. S. C. sec. 380.) The only way such deposits could be secured was under section 45 of the National Bank Act (Sec. 90 of Title 12, U. S. C., sec. 5153 of the Revised Statutes).

We have already shown that the pledges were not made pursuant to section 45, and hence such pledge of assets could not be upheld as legal, even though the funds had in fact been United States postal funds. Of necessity, even though

these particular laws be considered as applicable in all particulars to the Canal Zone, they would give no validity to a pledge of assets to secure deposits of Canal Zone postal funds, in a bank not a designated government depositary.

(b) United States Postal Savings Act.

By Act of June 25, 1910, a postal savings system was created in the United States. Sec. 1 of c. 386 of this Act of 1910 (Sec. 759, Title 39, U.S.C.) requires the Board of Trustees of the Postal Savings System to deposit United States postal savings funds in banks and to take security therefor.

It is urged by petitioners that this section has been incorporated into the postal laws of the Canal Zone and is therefore authority for the pledge. This section is set out in full at pages 13-15 of the appendix. However, part of it is of sufficient importance to be quoted here. Thus it is provided:

> **"Postal Savings funds received under the provisions of this chapter shall be deposited in solvent banks."**
>
> "The Board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand."

It is clear from the quoted provisions that Sec. 759 applies only to postal savings funds in the United States and authorizes the Board of Trustees of the U. S. Postal Savings System to exact security upon making deposits of U. S. postal savings funds. Even if this section had been incorporated into the Canal Zone postal laws, it would apply only to that portion of the deposits here in question made up of postal savings funds. Of the deposit in the Commercial National Bank at the time of its closing only those funds composed of deposit money order funds are claimed to be comparable to postal savings funds, but we need not stress

this, as in our judgment these postal savings laws were not in fact incorporated into the Canal Zone laws.

The only postal law in the United States which requires the securing of any postal deposits is Section 759 of Title 39 U. S. C. discussed above which requires the Board of Trustees of the United States Postal Savings system to exact security upon depositing United States postal savings funds. This Act was passed June 25, 1910, and with this date in mind we turn to an examination of the Canal Zone Postal System as it relates to the Congressional Act of 1933.

By order of June 24, 1904, from the Secretary of War to the Chairman of the Isthmian Canal Commission (see appendix pp. 18-19) a temporary postal service was directed to be set up by the governor, but the order goes on to provide that the plan shall be submitted to the Chairman of the Isthmian Canal Commission for such action as the Commission shall approve.

On September 2, 1904, the Isthmian Canal Commission enacted Act No. 8 (appendix pp. 19-20) which provides:

> "The Postal Service of the Canal Zone shall be conducted, regulated and controlled by such of the laws, rules and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission."

This order of the Isthmian Canal Commission, while incorporating United States Postal Service laws then in force, could not and did not purport to incorporate future Acts of Congress. Since it was passed nearly six years before the Postal Savings Act of the United States was enacted by Congress, and seven years before there was a Postal Savings System in the Canal Zone, manifestly Sec. 759 of Title 39 U.S.C. (U.S. Postal Savings Act) was not by this Act of the Commission made a part of the Canal Zone postal laws.

See *In re Heath*, 144 U.S. 92, 94; *Kendall* v. *U.S.*, 12 Pet. 524, 624; *Munoz* v. *Porto Rico Ry. L. & P. Co.*, 83 F. (2d) 262, 266.

By Executive Order of September 8, 1911, a year after the U. S. Postal Savings system was established, a postal savings system was provided for the Canal Zone. The full text of this order is found in the appendix at pages 20-21. Examination of it indicates that while it follows the general pattern of the U. S. Postal Savings Act and provides for a board of trustees, consisting of the Collector of Revenues for the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal, it does not require or authorize the taking of security for Canal Zone postal savings funds, nor does it incorporate any United States Postal savings laws, but is complete in itself.

In 1914 the Postal Savings System of the Canal Zone was terminated by an Executive Order of September 5, which provides:

> "By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:
>
> "Section 1. The Executive Order of September 8 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed; Provided, That accounts opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.
>
> "Section 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.
>
> "Section 3. This order shall take effect from and after October 1, 1914."

Petitioners' chief reliance is predicated upon the Congressional Act of February 16, 1933 (47 Stat. 812, 48 U.S.C. sec 1323a), which simply extends such laws, rules and regulations of the United States Postal Service as are

applicable to the Canal Zone. The act was passed 23 years after the execution of the contract for security, 9 years after the repeal of the order creating a postal savings system for the Canal Zone, and only twelve days before the Commercial National Bank suspended. It provides:

> "The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone. . . ."

Section 759 of Title 39 U.S.C. which authorizes the Board of Trustees of the United States Postal Savings System to exact security upon deposit of United States postal savings funds. This section is an integral part of the United States Postal Savings Act, which, while part of the Postal Service of the United States, is a complete unit in itself. Inasmuch as the Executive Order creating the Postal Savings System for the Canal Zone had been repealed some nine years prior to the passage of the Act of February 16, 1933, so that the Postal Savings Act of the United States as a unit was no longer applicable to the Canal Zone, it seems obvious that nothing in the Act of 1933 can be construed as extending this one section of the United States Postal Savings System to the Canal Zone. Nor was the section itself applicable to conditions existing in the Canal Zone, since there was no longer a Postal Savings System in the Canal Zone, nor any Board of Trustees to function as required by this section.

Even if it be assumed that by the Act of 1933 Congress did extend Section 759 of Title 39 U.S.C. to the Canal Zone, it thereby only authorized a Board of Trustees of the Canal Zone Postal Savings System to exact security upon the deposit of postal savings funds in national banks, and it further authorized such trustees to exact only "such security in public bonds or other securities authorized by Act of Congress or supported by the taxing power." There has been no compliance with either of these requirements.

There is nothing in the record to show that the Board of Trustees of the Canal Zone, as such, had anything to do with the pledge in question, nor is there any evidence or allegation that any one of the officers who by virtue of his respective office constituted the Board of Trustees of the Canal Zone Postal Savings System during its existence took any action in connection with the pledge before or after the Canal Zone Postal Savings System was abolished. The security exacted for the deposit here in question is set forth in exhibit C-2 on page 21 of the Record, and clearly does not constitute the character of security which Section 759 of Title 39 U.S.C. requires to be taken to secure deposits of United States postal savings funds.

The record is clear that there was no attempt to comply with Section 759 of Title 39 U.S.C. and it would seem clear that this argument of petitioners' is merely an afterthought not warranted by the facts.

It is manifest that these petitioners have failed to point out any Act of Congress which either authorizes the Secretary of War to exact security from a non-designated and unauthorized depository for the deposit of Canal Zone postal funds, or which requires such unauthorized depository to give security to secure postal funds of the Canal Zone. There is nothing in the postal laws of the United States, or of the Canal Zone, which purports to give legality to a pledge such as is now before this Court, and it follows of necessity that this pledge is illegal and void under the principles of law laid down by this Court in the Pottorff, Sneeden and Lewis cases, and followed by the Court below in both *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 150, and the instant case.

Administrative Practice Cannot Supply Lack of Specific Statutory Authority So As to Legalize the Pledge.

Having failed to point to any specific authorization for the pledge here in question, petitioners next rely upon what they denote as "the consistent administrative practice". This argument of petitioners states that because officials of the government had assumed that national banks had an inherent power to pledge their assets to secure deposits of public money of the United States, such power must be considered as in fact existing. In view of the decisions of this Court previously referred to, it is quite clear that national banks have no such power, and manifestly administrative practice—no matter how consistent—cannot create a power where none exists.

In *City of Marion* v. *Sneeden*, 291 U. S. 262, at 269, the Court said:

> "In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

In view of Sec. 194 of Title 12 of the U. S. Code, which requires a ratable distribution of an insolvent national bank's assets among its creditors, and of Sec. 91 of Title 12 of the U. S. Code, which prohibits and declares void preferential transfers of a bank's assets in contemplation of insolvency, it cannot be argued that any custom or usage could legalize this pledge.

On this point this Court said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255:

> "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed

to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. Compare Davis v. Elmira Savings Bank, 161 U. S. 275, 290."

This question of custom and usage has been repeatedly asserted as a defense and uniformly overruled in various circuit court opinions, as to which this Court has consistently denied certiorari.

La Parr v. *City of Rockford*, 100 F. (2d) 564, 567, C. C. A. 7th, cert. denied No. 721, U. S. S. Ct. May 1, 1939.
Leonard v. *Gage*, 94 F. (2d) 19, 26, C. C. A. 4th Cir., certiorari denied, 303 U. S. 653;
City of Fort Worth v. *McCamey*, 93 F. (2d) 964, 968, C. C. A. 5th Cir., certiorari denied, 304 U. S. 571;
City of Chicago v. *Joseph*, 95 F. (2d) 444, 446, C. C. A. 7th Cir., certiorari denied, 304 U. S. 578;
Hood v. *Hardesty*, 94 F. (2d) 26, 29, C. C. A. 4th Cir., certiorari denied, 303 U. S. 661;
Granzow v. *Village of Lyons*, 89 F. (2d) 83, 85, C. C. A. 7th Cir.
O'Connor v. *Rhodes*, 79 F. (2d) 146, 151 (App. D. C.).

Indeed the main document relied upon by petitioners as establishing the "consistent administrative practice," set forth no pages 42-45 of their brief, is an extract from a memorandum which accompanied a bill which the Treasury Department sought to have enacted as an amendment to Section 45 of the National Bank Act (Sec. 90, Title 12, U. S. C.). The bill was never enacted by Congress and the memorandum would seem to be of little value.

However, it should be noted that while the memorandum indicates that the Treasury Department may have assumed that national banks had the power to pledge assets to secure deposits of federal funds, it also definitely shows that as a result of the Pottorff and Sneeden cases the Treasury officials realized that their assumption was erroneous and that no such power in fact existed. Thus part of the memo-

randum (p. 43 of petitioners' brief), in referring to the Sneeden and Pottorff cases, states:

> "The court took the position that national banks have no implied power to give security for deposits of public money notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency."

Since these decisions there is no longer any question of the absence of such power and consequently there is no basis for looking to administrative construction as a method of construing an ambiguous statute. No ambiguity exists, unless this Court's decisions are to be ignored, nor do any of the cases cited by petitioners support the proposition that where a power has been held not to exist, administrative practice—no matter how long continued—can create such power.

II.

Neither the United States Nor the Panama Canal is an Indispensable Party to this Action.

The attempted pledge of the bank's assets to secure Canal Zone deposits in the absence of express statutory authority was void, and no title to said assets passed thereby to the intended pledgee.

It has been demonstrated under Point I that (1) national banks derive their powers from Congress and powers not granted are denied; (2) that authority to pledge their assets must be by specific act of Congress; (3) that no act of Congress authorized the bank to effect the pledge or required the depositing officer to exact it; (4) that no general or incidental power is vested in national banks to pledge their assets to secure government or other deposits, and that each Act of Congress authorizing or requiring such pledges has by its terms been expressly limited to the deposits therein described.

It is now definitely settled that unauthorized pledges by national banks are illegal and void because *ultra vires*, and that the intended pledgees acquired no title or right in the securities, which always remain assets of the bank. These principles are clearly enunciated in the following cases:

Central Transportation Company v. *Pullman's Palace Car Company*, 139 U. S. 24;
Texas & Pacific Ry. Co. v. *Pottorff*, 291 U. S. 245;
LaParr v. *City of Rockford* (C. C. A. 7), 100 F. (2d) 564, 569, *certiorari* denied No. 721, U. S. S. Ct., May 1, 1939;
Hood v. *Hardesty* (C. C. A. 4), 94 F. (2d) 26, 29, *certiorari* denied 303 U. S. 661;
Redfield Independent School District v. *Schneizer* (C. C. A. 8), 94 F. (2d) 257, 258;
City of Ft. Worth v. *McCamey* (C. C. A. 5), 93 F. (2d) 964, 967, *certiorari* denied 304 U. S. 571;
Queenan v. *Mays* (C. C. A. 10), 90 F. (2d) 525, 533, *certiorari* denied 302 U. S. 724;
Leonard v. *Gage* (C. C. A. 4), 94 F. (2d) 19, 23, 24, *certiorari* denied 303 U. S. 653;
City of Chicago v. *Joseph* (C. C. A. 7), 95 F. (2d) 444, 446, 447, *certiorari* denied 304 U. S. 578;
The Illinois Central Ry. Co. v. *Rawlings* (C. C. A. 5), 66 F. (2d) 146, 149, *certiorari* denied 291 U. S. 668;
Baltimore and Ohio Ry. Co. v. *Smith* (C. C. A. 3), 56 F (2d) 799, 801.
Downey v. *City of Yonkers* (C. C. A. 2) decided Aug. 3, 1939.

This Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, *supra*, on these questions said at page 260:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Nat. Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24."

The Pottorff-case related to the powers of the national bank, but on the principles of law involved, this Court cited with approval the case of *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, which laid down at pages 59 and 60 the fundamental principle here contended for by respondent that:

> "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, *is not voidable only, but wholly void, and of no legal effect.* The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (Italics supplied.)

Respondent contends that the denial of *certiorari* by this Court in the above enumerated cases arising in the 4th, 5th, 7th and 10th circuits clearly indicates that this Court has definitely approved the fundamental principle that pledges *ultra vires* national banks are wholly void and no right and title thereby passes to the intended pledgee.

The rule is well illustrated in the decision of *Illinois Central R. R. Co.* v. *Rawlings*, (C.C.A. 5) 66 F. (2d) 146 *certiorari* denied 291 U. S. 668, wherein that Court, considering the nature of an *ultra vires* pledge, stated at page 149:

> "* * * By the *Pottorff* Case it was meant to decide, and it was decided, that such an arrangement, looking to creating, in the event of insolvency, preferences among general depositors, was fundamentally invalid; that no rights could be predicated on it, or on the physical possession of the pledged bonds acquired by virtue of it. * * *"

So, in *Baltimore and Ohio Ry. Co.* v. *Smith, supra,* in referring to an attempted pledge of a national bank's assets to secure a deposit, the Court said, at page 802:

> "Such a contract is not only voidable but wholly void and of no legal effect."

The Circuit Court of Appeals for the 7th Circuit reached the same conclusion in *City of Chicago* v. *Joseph, supra,* wherein it was stated at page 446:

> "If we are permitted to accept the averment that the securities were those of the bank and that defendant was so advised, the pledge was invalid, and, as we said, in the last mentioned case, 'being void the transaction could not be confirmed, ratified, enforced or rendered enforceable by the application of any doctrine of estoppel or otherwise. (Citing cases) This is because, not merely that the bank ought not to make the contract, but that it could not legally make it. Ratification is impossible if there is no power to contract. (Citing cases) And knowledge of the lack of existence of authority is conclusively presumed.'"

In *LaParr* v. *City of Rockford, supra,* where it was shown no statutory authority existed for the pledge, the Court at page 567, held:

> "It follows, therefore, that the pledge of the assets was illegal. * * * All of the parties assumed that the pledge was valid. Their assumption was incorrect, but that it was erroneous was not authoritatively established by the Supreme Court until after the payment of the deposit to the city. Immaterial, however, is the motive that inspired the parties, for, under the law, the pledge was invalid, and no act of the bank, the receiver or the comptroller could validate it."

Respondent contends that the foregoing authorities establish that the pledges made in the instant case were void

because *ultra vires* the powers of the bank, since no Act of Congress authorized or required the pledge. Further, this Court has held that no rights arise under an *ultra vires* contract, hence the pledged assets remain the property of the bank, and neither the United States nor the Canal Zone nor the individuals to whom the property was pledged acquired any right or interest in the illegally pledged securities.

At most these individuals acquired an unlawful possession, and likewise their successors in office acquired an unlawful possession and only such title as flows from such possession. As will be developed subsequently, respondent may recover his property, in the form of the bonds or their proceeds, from the person in possession without making the United States or the Canal Zone a party to the suit.

Since the pledge was void, respondent may recover his property from the person in possession, and the alleged official holding of petitioners cannot be sustained because they are unable to produce lawful statutory authority for their retention of respondent's property.

The bill of complaint alleged in substance that after the opening of the Canal Zone deposit account in the Commercial National Bank, said bank unlawfully and illegally pledged certain of its assets to the then Secretary of War, as security for the Canal Zone deposits therein made; that after suspension said Secretary of War took over said bonds and that upon said taking, said bonds became a trust and were held as such by petitioners, and respondent claimed the return of said bonds—or if sold, the proceeds derived from such sale—and prayed for a decree requiring petitioners to account therefor.

The petitioners admitted the allegations of fact recited above, but denied that the said bonds became or were a trust, or that the bank lacked capacity to pledge said bonds

as security for the deposits, and said petitioners, in their answer, further averred (R. 83):

> "Said defendants admit the allegations of fact contained in subparagraph four of paragraph 12 but deny that the said bonds became or were a trust and were held as such by the then Secretary of War or the then General Purchasing Officer and Chief of the Washington Office, Panama Canal, or are so held by their successors in office for the alleged beneficiaries, and deny that plaintiff is entitled to the return of said bonds or to the proceeds thereof as alleged in said subparagraph."

The Commercial National Bank case does not present the separate issue urged by petitioners in the case of *Woodring* v. *Wardell* where the proceeds of the bank's pledged assets have been placed in a bank to the credit of petitioners. Therefore, much of the argument of the brief in No. 5 is wholly inapplicable to the facts of record in the instant case and in the discussion hereinafter made on the right of respondent to recover from the individuals in possession of the bank's property, *it should be borne in mind that this suit is an action to recover respondent's property from the persons admittedly in possession, and the technical arguments advanced in the Wardell case by reason of the existence of the bank account in the Hamilton National Bank in that case have no application here.* The factual distinction is shown herein at pages 5-6.

It is necessary, in order to emphasize the underlying principle which entitles respondent to recover the bank's property from the possession of the petitioners, to note the fundamental distinction here existing between the original deposits made in the Commercial bank and the bonds now in the possession of the petitioners or the proceeds of the bonds originally pledged, which are the subject matter of this suit.

The Canal Zone deposits obviously were funds belonging to the Canal Zone Government when placed in the bank

and as to which a debtor-creditor relationship arose between the bank and the depositor. These funds are not the subject matter of this suit.

Inasmuch as this action is brought to recover the assets of the bank, and does not relate to the deposits made by officials of the Panama Canal, or the United States, neither the United States nor the Panama Canal is an indispensable party to this action. This conclusion is predicated upon a careful consideration of this question by this Court in the following cases:

> *U. S.* v. *Lee*, 106 U. S. 196, 213, 215;
> *Osborn* v. *Bank of the U. S.*, 9 Wheaton 738, 843, 844;
> *Tindal* v. *Wesley*, 167 U. S. 204, 223;
> *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619;
> *Ex parte Ayers*, 123 U. S. 443, 500;
> *Allen* v. *B. & O. Ry. Co.*, 114 U. S. 311, 315;
> *Poindexter* v. *Greenhow*, 114 U. S. 270, 288, 289;
> *Scott* v. *Donald*, 165 U. S. 58, 70;
> *Ickes* v. *Fox*, 300 U. S. 82, 87, 88;
> *U. S.* v. *Peters*, 5 Cranch (9) 115, 139, 140.

This Court in *Barney* v. *Baltimore*, 6 Wall. 280, 281, 284, classified parties to actions in traditional categories of "proper", "necessary", and "indispensable" parties, and as Judge Knox observed in *Baldwin* v. *Chase National Bank*, 16 F. Supp. 918, 920:

> "To be indispensable, the absent party must at least have such an interest in the subject-matter of the controversy that equity and the concepts of practical judicial administration necessitate his presence. *If the absentee be without legal or equitable* interest in the controversy, although his rights may be affected indirectly by the decision, he is not even a necessary party. (Citing cases.) A fortiori, *a party with no legal or equitable interest in the subject-matter is not an indispensable party.*" (Italics supplied.)

Respondent contends that the purported pledge of the bank's assets to the Secretary of War was *ultra vires* and

void, passing no interest in the securities to the intended pledgee and since the intended pledgee acquired no right or interest in the bank's pledged bonds, or the proceeds thereof, neither the United States nor the Canal Zone is an indispensable party herein.

Petitioners' sole defense in this phase of the argument is predicated upon the assertion of an interest of the United States in the proceeds of the pledged bonds, and they contend that the mere assertion of this interest is sufficient to preclude this Court examining the merits of the case. We have previously shown that no interest passed to the United States and it is also well established that the mere assertion of title in a sovereign is not sufficient to defeat the Court's jurisdiction.

In *Tindal* v. *Wesley*, supra, the Court said, at p. 221:

> "We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this Court in *United States* v. *Peters*, 5 Cranch, 115, 139: 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the Government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the State, nor one in which the plaintiff seeks to compel the specific performance by the State of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the State."

It is clear that to preclude this Court's jurisdiction the petitioners must show affirmatively that the United States has some lawful interest in the property and unless they can make good their assertion of title in the United States,

respondent is entitled to recover his property unlawfully held by these petitioners.

In *Osborn, et al.* v. *Bank of the U. S.*, supra, in which one Osborn, the Auditor of the State of Ohio, acting pursuant to a state statute, obtained and delivered to his successor in office $100,000 from the Bank of the United States as the amount of a tax assessed by the State, the defendants urged that they held the money soiely as officers of the State of Ohio, the owner thereof, and that "the court ought not to proceed without making the state a party", and if that could not be done, that the Court should not take jurisdiction of the cause (p. 846). The Chief Justice overruled the objection saying (p. 846):

> "The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank. . . ."

The Chief Justice in holding further that, inasmuch as the statute of Ohio was unconstitutional and void, no party could obtain any right thereunder, and relief should be given in the case without making the State of Ohio a party, said (pp. 858-9):

> "But, it has been shown, we think, that an action of detinue might be maintained for that article, if the bank has possessed the means of describing it, and that the interest of the state would not have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown, that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial and effective.

> "It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

The decision of Chief Justice Marshall in *Osborn, et al.* v. *Bank of the U. S., supra*, and the principles enunciated in that case have been reaffirmed by this Court in numerous subsequent cases and the Court has consistently held in such cases that where the plaintiff seeks to recover his property in its original or changed form, a third party for whom the defendant purports to hold the property, or to whom defendant thinks he is indebted therefor, is not an indispensable party, particularly if he cannot be made a party to the cause.

In *Scott* v. *Donald*, 165 U. S. 58, this Court said at page 67:

> "A preliminary question is raised by the proposition that these are in fact suits against the state of South Carolina, and forbidden by the 11th Amendment. This question is sufficiently disposed of by referring to the late case of Re Tyler, 149 U. S. 164, where the conclusion of numerous previous cases was stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the state."

In *United States* v. *Lee*, 106 U. S. 196, the Court, in holding that a plea of sovereign immunity on behalf of the United States was not well taken, and that the United States was not an indispensable party, said at page 210:

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

The doctrine under which respondent is entitled to recover from the petitioners is carefully analyzed by this Court in *In re Ayers*, 123 U. S. 444, 500, 501, 502, where it it is said:

"In pursuance of the principles adjudged in the case of *Osborn* v. *Bank of U. S.*, *supra*, it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be collected by seizures of property imposed in the name of the State, but contrary to the Constitution of the United States, the defendants being officers of the State threatening the distraint complained of. The grounds of this jurisdiction were stated in Allen v. Baltimore & O. R. R. Co., 114 U. S. 311. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the person or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in *Poindexter* v. *Greenhow*, 114 U. S. 270 as follows. [page 282] 'The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully with force and arms seized, taken, and detained the personal property of another.'

It was also stated [page 288], 'The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do.' The legislation under which the defendant justified being declared to be null and void as contrary to the Constitution of the United States, therefore, left him defenseless, subject to answer to the consequences of his personal act in the seizure and detention of the plaintiff's property, and responsible for the damages occasioned thereby.

"This principle is illustrated and enforced by the case of *U. S.* v. *Lee*, 106 U. S. 196. In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."

The Respondent's Right to Recover His Property Cannot Be Defeated on the Ground That His Property Has Been Transferred to a Successor in Office.

Petitioners urge that while the action might have been maintained against the former Secretary of War as an individual in possession that the action must now fail because Secretary of War Woodring in acquiring the securities, must have taken them in an official and not individual capacity. The vice in this argument lies in the fact that if it be considered that the original taking by his predecessor in office was without authority in law it seems clear that his predecessor could pass no more title to his successor in office than he had obtained. It would hardly seem arguable that since the predecessor in office of the present petitioner acquired respondent's property in violation of law, the mere passing of that property over to the successor could operate to divest respondent of his ownership in the property or serve to create any interest, official or otherwise, in the property to the successor officer. The successor officer would, like his predecessor, be unable to show lawful authority for his holding and consequently his holding would be personal and subject to the rule set out in *In re Ayers, supra* (p. 501), that if he is unable to show any lawful authority under the United States there is nothing to prevent the judgment of the Court against him as an individual for his individual wrongful retention of respondent's property.

Further, petitioners' contention is fully answered by the decision of the court in *Osborn* v. *The Bank of the United States, supra*. In that case H. M. Curry, the then Treasurer of the State of Ohio, was the original recipient of the $100,000.00 in specie and bank notes belonging to the plaintiffs and he was succeeded in office by S. Sullivan, who was the present Treasurer, and he gave a receipt for the moneys. This court concluded at page 870:

"We think, then, that there is no error in the decree of the Circuit Court for the district of Ohio so far as it directs restitution of the specific sum of $98,000, which was taken out of the bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of $2,000 by the defendants, Ralph Osborn and John L. Harper."

The test that must be applied by the Court is that of ownership and since it has been conclusively shown that respondent is the owner of the property for which this action has been instituted and the petitioners who have possession of the property are unable to show any authority in law for their holding, the defense of indispensability of parties must fail.

The contention that petitioners as government officials have decided a doubtful question arising out of a voluntary commercial transaction and therefore are not subject to suit ignores the basic principle that the pledge was unlawful and void, because ultra vires the bank, hence any official administrative decision thereon would be a nullity.

The substance of petitioners' argument on this point is that the power of the national bank to pledge its assets to secure the deposits in question is at least doubtful, and when the Secretary of War accepted a pledge from the bank, he was exercising executive discretion which might not now be examined into or controlled by the Court. Respondent has no quarrel with the doctrine that when Congress has vested discretionary powers in an administrative official and he has exercised those powers, whether rightly or wrongly, his determination is not subject to review.

However, the argument and the cases supporting such argument are without application here because Congress

has not authorized the Secretary of War in his discretion to exact security from the national bank. In the absence of any Act of Congress either authorizing the bank to make the pledge or requiring the Secretary of War to exact it as a condition of the deposit, it appears clear that the Secretary of War was not exercising a discretion with respect to powers vested in him by Congress.

In conclusion on this point, it will be noted that in the case of *Berger* v. *Chase National Bank* (C. C. A. 2nd), decided July 24, 1939, relied upon by the petitioners herein, the Court with respect to the question of the necessity of additional parties, and in other procedural matters held:

> "If the pledges were illegal, it seems that the defendant has funds which in equity and good conscience it must return to the plaintiffs, and the procedural and other difficulties concerning parties, a formal trust res, and so on, do not avoid that conclusion."

III.

No Claim is Made that the Canal Zone Deposits in the Bank Were in Violation of Law and this Question is Not Before the Court for Consideration.

As admitted on pages 69-70 of their brief, petitioners' answer did not allege that the bank held the deposits as trustee *ex maleficio* and this issue as to the Canal Zone funds was raised in neither court below, nor was this issue urged in the petition as a basis for granting the writ of certiorari. Therefore, the question is not now before this court.

Rorick v. *Devon Syndicate Ltd.*, 307 U. S. 299;
A. Schrader's Sons, Inc. v. *Wein Sales Corporation*, 9 F. (2d) 306, 308;
U. S. ex rel. Mistoras v. *McCandless*, 61 F. (2d) 366, 368;
Helvering v. *Helmholz*, 75 F. (2d) 245, 246.

Petitioners while not contending that the deposits of Canal Zone funds were illegal, state on pages 70-73 that if the deposits were illegal then the bank held them in trust. Inasmuch as there is now no question as to the legality of the deposits there is no need to consider what relationship might have arisen had the deposits been illegal.

IV.

The Allowance of Interest as Awarded in the Judgments, While Not Assigned as Error or Argued Below or in the Petition for Certiorari, Was Proper as a Matter of Law.

The brief in the instant case, No. 6, does not contain any reference to the question of the allowance of interest, but in No. 5, to which reference is made in this brief, the petitioners urge that in any event the judgment should be reversed because of the allowance of interest to respondent.

In this connection it would appear proper to advise the Court that no objection was made to the allowance of interest in the decree; the decree was consented to as to form; no assignment of error was made with respect to the allowance of interest; the point was neither briefed nor argued in the U. S. Court of Appeals for the District of Columbia; nor was it urged or relied upon in either of the petitions for *certiorari*.

In this situation it would appear that petitioners have lost all right to urge this as a ground of reversal in this Court and that it should not be noticed.

A. Schrader's Sons, Inc. v. *Wein Sales Corp.*, (C. C. A. 2) 9 F. (2d) 306, 308;
U. S., ex rel. Mastoras v. *McCandless* (C. C. A. 3) 61 F. (2d) 366, 369;
Helvering v. *Helmholz*, (U. S. C. A., D.C.) 75 F. (2d) 245, 248;
Rorick v. *Devon Syndicate, Ltd.*, 307 U.S. 299.

In the last cited case the Court said, at page 303:

> "Of the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175; *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U.S. 493."

The various circuits of appeal have consistently awarded interest in cases of this character and this Court has consistently denied certiorari.

In the case of *Redfield Independent School District No. 20* v. *Schnetzer*, 94 F. (2d) 257, the Trial Court awarded interest from the date of the conversion of the illegally pledged securities, which was noted by the Appellate Court, where in its opinion on page 258 it said:

> "The trial court held that the pledge was void; that the school district was an unsecured creditor which had, by mistake, received an overpayment out of the assets of the insolvent estate; and that *the receiver was entitled to recover the overpayment with interest.* Judgment was entered accordingly." (Italics supplied.)

The Appellate Court concluded at page 259:

> "The judgment of the court below was correct and is affirmed."

In *Hood* v. *Hardesty*, 94 F. (2d) 26, the trial court granted interest from the date of the preferential payment to the State bank receiver, and the allowance of interest was included in the general affirmance of the Circuit Court without comment.

In *City of Chicago* v. *Joseph*, 95 F. (2d) 444, cert. den. 304 U. S. 578, the court in awarding interest, stated at page 447:

> "When the city wrongfully retained the property of plaintiff and converted it into money, it committed a

wrongful act and is *chargeable with interest* from the time of demand." (Italics supplied.)

The District Court there having failed to allow interest, the Appellate Court ordered at page 447:

> "The judgment is reversed, with directions to the District Court to enter one for the same amount with interest at 5 per cent. from the date of demand and the costs in that court."

And see *La Parr* v. *City of Rockford* (C. C. A. 7), 100 F. (2nd) 564, 568, cert. denied No. 721, U. S. S. Ct., May 1, 1939. *Downey* v. *City of Yonkers* (S. D. N. Y.), 23 Fed. Sup. 1018, 1024, affirmed *Downey* v. *City of Yonkers* (C. C. A. 2), Aug. 3, 1939.

STATEMENT OF FACTS AS TO THE MERCHANT FLEET CORPORATION

The Merchant Fleet Corporation, under its former title, U. S. Shipping Board Merchant Fleet Corporation opened a deposit account with the Commercial National Bank on or about August 18, 1917, but according to the answer this account was closed on or about August 5, 1918 (R. 30) and so does not figure in the instant case.

On December 1, 1921, the Fleet Corporation opened a deposit account with the Commercial National Bank under the name and caption, "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account," and this account was continuously maintained in the Bank up to the time of closing. (R. 37-38). The purpose for opening this account is shown in the following resolution of the Board of Trustees of the Fleet Corporation, adopted December 1, 1921: (R. 38)

> "Whereas, In the interests of the United States it is desirable to facilitate the negotiation of checks drawn on depositaries other than the Treasurer of the United States,

"Resolved, That the Treasurer of the United States Shipping Board Emergency Fleet Corporation be and he is hereby authorized to open an account with the Commercial National Bank of Washington, D. C., a constituent member of the Federal Reserve and a government depositary, in the name of the United States Shipping Board Emergency Fleet Corporation, subject to the check of the Treasurer, this account being established for the purpose of depositing for immediate collection checks drawn in favor of the Emergency Fleet Corporation on depositaries other than the Treasurer of the United States; proceeds from said checks to be placed in said account to the credit of the Emergency Fleet Corporation in order that they may be available for immediate expenditure by the Emergency Fleet Corporation or transfer to the Treasury of the United States."*

This account was composed of moneys derived from proceeds of sale of Government vessels, revenues from the operation of Government vessels, rentals from real estate owned by the United States, bank interest and miscellaneous revenues (R. 38), and were obtained by the Fleet Corporation either as a result of appropriations by Congress for expenses of the Corporation (R. 37) or else from the operation of the Corporation.

Pursuant to Section 14 of the Merchant Marine Act of 1920, Appendix p. 33, from time to time funds were transferred from this deposit account in the Commercial Bank and covered into the United States Treasury (R. 38). The Corporation also kept and maintained during all of this time, deposit-checking accounts in the Treasury where it deposited funds similar to those in the account of the Commercial Bank (R. 38-39).

The Fleet Corporation also opened a deposit account in the Commercial Bank on January 14, 1926, under the caption and designation "United States Shipping Board Mer-

* It will be noted that the Commercial National Bank was not designated by the Secretary of the Treasury as a depositary of public monies of the United States (R. 43).

chant Fleet Corporation, Agent, Good Faith Deposit Account." The moneys in this account consisted exclusively of funds derived as security for performance of sales or purchase proposals submitted to this petitioner as agent for the U. S. Shipping Board or other similar suspense items. The only disbursements from this account were to unsuccessful bidders for the return of their deposits or for deposit with the Treasurer of the United States when the bidder's deposit was forfeited or was credited on the transaction for which the deposit had been made (R. 39).

Originally both of the accounts of the Fleet Corporation in the Commercial Bank were unsecured, but on November 4, 1931, the Board of Trustees of the Fleet Corporation duly adopted the following resolution: (R. 39-40)

> "WHEREAS, monies of the United States have been deposited in divers banking institutions by the Merchant Fleet Corporation; and
>
> "WHEREAS, it is provided under Title 12, Sec. 90, of the Compiled Statutes, that the Secretary of the Treasury shall require all national banking institutions who are acting as financial agents of the Government to give satisfactory security by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them; and
>
> "WHEREAS, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress:
>
> "Resolved, that all banks and banking institutions which have or shall have monies of the United States in the name of the United States Shipping Board Merchant Fleet Corporation be and they are hereby required as a condition of the said deposit to give satisfactory security to said Merchant Fleet Corporation by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as depositaries of such monies.
>
> "Further resolved, that the Treasurer of the United States Shipping Board Merchant Fleet Corporation be and he is hereby authorized and required to address to

each one of the said banks and banking institutions now having such monies on deposit, a letter in the form hereto attached enclosing a form of deposit agreement, and as a condition for the continuance of said deposit the said Treasurer of the said Merchant Fleet Corporation is authorized and directed to require the signing of an agreement in the form attached hereto, and the deposit by such depositary of United States Bonds in adequate amounts as collateral for the repayment of the amount of each deposit in each bank and banking institution, respectively."

After the adoption of this resolution, Albert H. Denton, who was then a Commissioner of the United States Shipping Board and Chairman of said Board's Committee on Finance, was authorized to negotiate with the Commercial Bank to obtain security for the deposit of money in said bank by the Fleet Corporation. Negotiations were then had with the Bank, and with the Comptroller of the Currency concerning the deposits and the obtaining of the security therefor. The Bank was advised that unless adequate security was had the account would be closed (R. 40). As a result of these negotiations, and with the approval of the Comptroller of the Currency, the Bank entered into a contract, (Exhibit B1, R. 15-17) which was duly approved by the United States Shipping Board, December 9, 1931 (R. 41), with the Fleet Corporation which provided that the Bank would pledge certain Real Estate Notes to the Fleet Corporation to secure the deposits in the two accounts previously referred to, and that other security could be substituted for the said notes if they were acceptable to the Fleet Corporation.

On July 20, 1932, the Bank in a letter addressed to the Treasurer of the Fleet Corporation (Exhibit F-R. 69) requested to be advised as to whether a substitution of United States Government Bonds or Treasury Notes would be accepted by the Fleet Corporation in lieu of the Real Estate notes previously pledged. This proposal was accepted by the Shipping Board and the substitution was

made (R. 41). However, it will be noted that a substantial part of the securities substituted were not actually the property of the Commercial Bank but were borrowed from another institution (R. 51)

On February 27, 1933, when the Bank suspended operations and was closed (R. 30), there was in the Merchant Fleet's "Deposit Account" the sum of $264,302.16, and in its "Good Faith Account" the sum of $144,995.12, and on March 8, 1933, the Treasurer of the Fleet Corporation conferred with certain officials of the Division of Insolvent National Banks to determine what method should be pursued in selling the collateral which secured the Fleet Corporation's deposits (R. 31). Acting under a mistake of law, the Receiver of the Bank notified the Fleet Corporation that he would interpose no objection to the sale of the bonds, and the bonds were then delivered to the Treasurer of the United States for safekeeping. After this delivery to the Treasurer of the United States, the Receiver of the Commercial National Bank, acting under a mistake of law, on April 13th and 18th, 1933, redeemed from the Fleet Corporation a portion of the assets so pledged by a payment to the Fleet Corporation of $281,695.31. The remainder of the assets pledged by the Bank to the Fleet Corporation were sold by the Corporation on April 17, 1933, for the sum of $125,929.69.

STATEMENT OF FACTS AS TO THE INLAND WATERWAYS CORPORATION

By the Act of June 3, 1924 (43 Stat. 360) the Inland Waterways Corporation was formed for the purpose as declared by Congress "of carrying on the operation of the Government owned inland, canal and coastwise waterways system to the point where the system can be transferred to private operation * * * of carrying out the mandate of Congress prescribed in Section 201 of the transportation Act of 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of Section 500 of such Act. * * *"

This Act fixed the capital stock of the Waterways Corporation at $5,000,000 subscribed for by the United States, and paid to the Secretary of War, who the Act provided should be the incorporator, and who should govern and direct the corporation in the exercise of its functions. (R. 77)

The Corporation was directed to continue the operation of the transportation and terminal facilities then being operated by the Secretary of War, and directed the Secretary of War to transfer to the corporation all assets acquired, constructed, or operated by or under the direction of the said Secretary, or which reverted to the United States, under Section 201 of the Transportation Act of 1920.

On the 18th day of July, 1930, the Inland Waterways Corporation opened a Savings Deposit Account in the Commercial Bank, and on the 5th day of March, 1931, a checking account was opened pursuant to express agreements between the Bank and the officers of the Waterways Corporation, whereby it was agreed that in consideration of deposits by the Corporation, the Bank would deposit in the Federal Reserve Bank at Richmond, Virginia, subject to defendant's order and control, certain securities to safeguard the deposits. Pursuant to these agreements securities were deposited with the Federal Reserve Bank in Richmond, Virginia, subject to the Corporation's order and control, and the deposit accounts were opened. (R. 74). The moneys in these accounts were composed in part of revenues received from the operation of the corporation, and in part from the appropriation made by Congress as a stock subscription. (R. 79).

The demand of security for deposits was pursuant to the by-laws of the Inland Waterways Corporation promulgated on August 7, 1924 by the Secretary of War. (R. 75) Under said by-laws the Secretary-Treasurer of the Corporation was named as accountable officer, and his duties were specified as follows:

"It shall be his duty to collect, receive, and hold the moneys, notes, bonds, certificates of stock, and other evidences of value and security of the Corporation, and deposit them in such depositaries under such conditions as may be approved by the Secretary of War."

The Secretary of War approved the deposit of the funds and required the Secretary-Treasurer of the Waterways Corporation to secure the deposit of funds by the pledging of bonds, in accordance with the by-laws afore-mentioned. (R. 75)

At the suspension of the Bank on April 20, 1933, the amount in the savings account was $271,113.05 and in the checking account $211,543.52. After such suspension the Receiver of the Bank, under a mistake in law, redeemed from the Inland Waterways Corporation part of the pledged assets consisting of United States 4¼% Liberty Bonds of 1933-1938 of a par value of $245,000, by the erroneous payment to said corporation of the sum of $245,000. On or about the same date the Waterways Corporation sold the remainder of the collateral pledged by the Bank for the sum of $261,215.63.

SUMMARY OF ARGUMENT

I.

National banks have no power to pledge their assets to secure deposits of the Merchant Fleet or Inland Waterways Corporations. There is no inherent or implied power in national banks to pledge their assets to secure deposits of public money of the United States, the only power to secure public money being found in Section 45 of the National Bank Act or subsequent acts of Congress specifically providing for the securing of Federal funds not here involved.

The deposits of the Merchant Fleet and Inland Waterways Corporations are not public monies of the United States within the purview of Section 45 of the National

Bank Act, nor has there been any compliance with the provisions of said section.

II.

The deposits made by the Merchant Fleet Corporation and the Inland Waterways Corporation in the Commercial National Bank were legal, and created a debtor-creditor relationship, since there is no statutory restriction prohibiting the deposit of funds of these two corporations.

ARGUMENT AS TO THE MERCHANT FLEET CORPORATION AND THE INLAND WATERWAYS CORPORATION

I

National Banks Have No Power to Pledge Their Assets to Secure Deposits of the Merchant Fleet Corporation or the Inland Waterways Corporation.

Both the Merchant Fleet Corporation and the Inland Waterways Corporation contend that the pledges of assets made by the Commercial National Bank to secure their respective deposits were legal, and as a basis for this contention argue that these two corporations being instrumentalities of the Federal Government, and therefore their funds being public funds, there is an implied power on the part of national banks, likewise instrumentalities of the Government, to pledge their assets to secure deposits of such federal funds. This contention is identical with one advanced as to the deposits of the Canal Zone funds, and has been answered in the preceding part of this brief, ante, page 8 to page 13, where it was pointed out that this court, in *Marion* v. *Succden*, 291 U. S. 262, *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Lewis* v. *Fidelity Company*, 292 U. S. 559, determined that national banks had only those powers expressly granted by acts of Congress, and had no inherent or implied power to secure deposits of either public or private funds.

It has also been shown that, aside from certain pledges specifically authorized by Acts of Congress and limited to particular deposits not here involved, the only power granted by the National Bank Act to national banks to pledge their assets is found in Sec. 45 of that Act, and is limited to deposits of public money of the United States made by the Secretary of the Treasury in authorized depositories. These principles of law have been dealt with fully in connection with the Canal Zone deposits, and are equally applicable to the deposits made by the Merchant Fleet Corporation and the Inland Waterways Corporation; therefore, there is no need here to repeat what has previously been said.

These petitioners have been unable to point to any Act of Congress which specifically authorizes national banks to pledge their assets to secure deposits either of the Merchant Fleet Corporation or the Inland Waterways Corporation, or any Act which requires either of these two corporations to exact pledges as a condition to depositing their funds. In the absence of any such Act of Congress, specifically dealing with deposits of the Merchant Fleet or Inland Waterways corporation, we turn to an examination of these deposits in relation to Sec. 45 of the National Bank Act, and will demonstrate that the pledges cannot be considered as having been authorized by this Section.

We have previously pointed out in this brief, ante. pages 13 to 17, that Sec. 45 of the National Bank Act must be read in the light of the other Acts of Congress dealing with the public money of the United States, and that the term "public money" of the United States as used in these statutes, is limited to money under the control of the Secretary of the Treasury. In our judgment it is quite apparent that neither the funds of the Fleet Corporation nor those of the Inland Waterways Corporation are "public money" within the meaning of Sec. 45, or of any of the other acts of Congress dealing with the public money of the United States.

As to the Fleet Corporation.

An examination of the facts concerning the deposits in the two accounts maintained by the Fleet Corporation in the Commercial Bank indicates that in the "Agent Account" the moneys were derived from proceeds of sale of properties, rentals from real estate and other funds received by the Corporation in the ordinary course of its business, as well as money appropriated by Congress to the Fleet Corporation for the purpose of paying the operating expenses of the Corporation.* (R. 37-38.) The money in the "Good-faith Account" was derived from funds delivered to the Corporation as security for performance of sales or purchase proposals or similar suspense items (R. 39), and a great part of it would have been ultimately returned to the private parties who were the equitable owners of said money.

There is no question that the deposits made by the Fleet Corporation consisted simply of funds obtained by it in the ordinary course of its business, or of funds which had been made available to the Corporation for the conduct of its business by the appropriation acts of Congress.**

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* It will be noted that Sec. 495 Title 31 U. S. C. which covers "Deposits of public money, public depositories, receipts, postal revenues" and which requires the deposit "of moneys of the U. S." in the Treasury or in an authorized depository, expressly exempts money required for current expenditures.

** Congress has, by its annual appropriations acts, made available to the Corporation for its corporate purposes the funds which the Corporation deposited in the Commercial National Bank. *See:* Act of June 15, 1917, c. 29, 40 Stat. 182, 183; Acts of October 6, 1917, c. 79, 40 Stat. 345; July 1, 1918, c. 113, 40 Stat. 634, 650; June 5, 1920, c. 235, 41 Stat. 874, 891; March 4, 1921, c. 161, 41 Stat. 1367, 1382; August 24, 1921, c. 89, 42 Stat. 192; June 12, 1922, c. 218, 42 Stat. 635, 647-648; February 13, 1923, c. 72, 42 Stat. 1227, 1241-1242; June 7, 1924, c. 292, 43 Stat. 521, 530-531; March 3, 1925, c. 468, 43 Stat. 1198, 1209-1210; Acts of May 16, 1928, 45 Stat. 573, 585; February 20, 1929, 45 Stat. 1230, 1244; April 19, 1930, 46 Stat. 229, 244; February 23, 1931, 46 Stat. 1355, 1371; June 30, 1932, 47 Stat. 452, 467; June 16, 1933, 48 Stat. 283, 298.

The decisions of this court dealing with the status of the Fleet Corporation and the purpose for its incorporation leave no doubt that the primary objective in forming this corporation was to enable the Government to use commercial methods and to be *free of the various restrictions and safeguards* pertaining to public money of the United States.

In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1, a petition was filed for a Writ of Mandamus, seeking to compel the Comptroller General to pass upon the claims arising out of contracts with the Fleet Corporation. In affirming the action of the court below in dismissing the petitions this court had occasion to analyze the statutes under which the Fleet Corporation was created and from which its powers are derived, and pointed out, as indeed is perfectly obvious, that the main purpose for forming the Fleet Corporation was so that its financial operations might be free of the various restrictions which are placed upon public moneys of the United States. In this connection this court on pages 7 and 8 of its opinion said:

> "At no time, during the War, or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the Government or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General. The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during the Federal Control, have been audited, and the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of administration. Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."

In *United States v. Strang et al.*, 254 U. S. 491, in speaking of the status of the Fleet Corporation, at page 493, the Court said:

> "The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think that they were not agents of the United States within the true intendment of Sec. 41.
>
> "Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation."

In *Sloan Shipyards Corporation, et al.* v. *United States Shipping Board Emergency Fleet Corporation and the United States*, 258 U. S. 549, at pages 569, 570, the Court said:

> "The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. The judgment in this case also must be reversed."

In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl, supra*, the Court said at pages 5 and 6:

> "The Fleet Corporation was organized on April 16, 1917—ten days after the United States declared war. All of its stock was subscribed and paid for by the Shipping Board on behalf of the United States. And

all the stock has been held by it since. The Company was formed by the Shipping Board pursuant to the specific authority to form one or more corporations, which was conferred by the original Shipping Board Act, September 7, 1916, c. 451, Sec. 11, 39 Stat. 728, 731. Congress conferred this authority in contemplation of the possibility of war, and it required that any such corporation should be dissolved 'at the expiration of five years from the conclusion of the present European War.' The Fleet Corporation is thus an instrumentality of the Government. See *United States v. Walter*, 263 U. S. 15, 18. But it was organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct, and operate merchant vessels. The Act authorized the Board 'to sell with the approval of the President, any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein.' Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; it does not enjoy the priority of the United States in bankruptcy proceedings. *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549; and its employees are not agents of the United States, subject to the provisions of Sec. 41 of the Criminal Code. *United States v. Strang*, 254 U. S. 491. Compare 34 OP. Atty. Gen. 241."

Decisions of this Court have established the following principles of law as to the Fleet Corporation:

(1) It may be sued in the State or Federal courts like other private corporations.

United States ex rel. Skinner & Eddy Corporation v. McCarl, 275, U. S. 1, 6.

(2) It does not enjoy priority of the United States in bankruptcy proceedings.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, 574.

(3) Its employees are not agents of the United States subject to the provisions of Sec. 41 of the Criminal Code.

United States v. *Strang*, 254 U. S. 491, 493.

United States ex rel. Skinner & Eddy Corporation v. *McCarl, supra* at page 12.

(4) Its financial transactions are not required to pass through the General Accounting offices of the Government.

United States ex rel. Skinner & Eddy Corporation McCarl, supra at page 7.

(5) It may sue in its own name and not necessarily through the Attorney General's office.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp. supra* at page 565.

(6) Suits against it do not have to be brought in the Court of Claims.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp. supra* at pages 569-70.

(7) It is liable for breach of contract.*

United States ex rel. Skinner & Eddy Corporation McCarl, supra 6.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp. supra* at page 570.

In view of these decisions as to the purposes for the formation of the Fleet Corporation and its status, there would seem to be no doubt that it is substantially the same as a private corporation and is entirely free from the restrictions placed by Federal Statutes upon public property and public monies of the United States. The Fleet Corporation as a Government corporation comes within the rule laid down by this Court in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907, where it was said:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends

* Nor is there any question as to the corporation's being suable in tort. *Kiefer & Kiefer v. R. F. C.*, 306 U. S. 396, 398.

to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the Corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank, Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

Subsequent to the decisions of this Court, dealt with on the preceding pages, a controversy arose between the United States Shipping Board and the Comptroller General of the United States which is set forth in an exchange of letters between these two branches of the Government.

In their brief, petitioners have referred only to two letters from the Comptroller General to the Shipping Board and have set these letters forth in full on pages 28-35 of the appendix to their brief. We think it desirable that the Court should have before it both sides of the correspondence on the subject. Consequently, we have included in the appendix hereto, pages 34-50 the letters of the Shipping Board and the replies of the Comptroller General.

An examination of these letters indicates that the Comptroller General by letter of June 16, 1931, advised the Shipping Board that in his opinion the monies derived from the business operation of the Fleet Corporation were monies of and for the use of the United States and should be covered into the Treasury. The Fleet Corporation, on the contrary, insisted that this money, while money of the United States in the sense that the United States owned all of the stock of the Fleet Corporation and, therefore, was the ultimate beneficiary, was not money of the United States within the meaning of the various statutes dealing with public money of the United States and pointed out the various decisions of this Court indicating that the purpose of Congress was to have the Corporation function free of the restrictions which applied to public moneys of the United States as such.

It is interesting to note from the letter of February 29, 1932, that the Shipping Board did not consider the deposits made in the Commercial National Bank by the Fleet Corporation as being the character of money covered by Section 45 of the National Banking Act (Sec. 90, Title 12, U. S. C.).

In this connection, the letter of February 29, 1932, from the Chairman of the Shipping Board to the Comptroller General of the United States, appendix pages 45-50, states:

> "By reason of the fact that complete ownership of the capital stock of the Merchant Fleet Corporation rests in the United States, it is apparent that in the final analysis, funds of the Corporation are moneys of the United States, and this fact the Shipping Board has never denied. We do believe, however, and in this belief are supported by decision of the Comptroller of the Treasury of the United States of December 12, 1919, which has previously been brought to your attention, that moneys of the Merchant Fleet Corporation are *not* moneys of the United States which are required to be deposited in the Treasury or in a designated depository as public moneys."

The fact that the Fleet Corporation did not feel that it was required to comply with Section 45 of the National

Banking Act is also clear from the record, since the contract, (Ex. B-1, - R. 15), by which the Commercial National Bank pledged its assets to secure the deposits made by the Fleet Corporation provide for the pledging of real estate notes, which are not a type of security permissible for securing public money of the United States. This is also brought out in the letter of February 29, 1932, from the Chairman of the Shipping Board to the Comptroller General, appendix, pages 45-50 wherein it is stated:

> "You also offer objections to the nature of the collateral furnished by the Commercial National Bank to secure this account. As previously stated, the Shipping Board does not consider itself bound by the requirements of Title 12, section 90 of the Compiled Statutes, and for this reason believes it was fully justified in accepting as collateral for this deposit, a different form of security than that specified by Circular No. 176, issued by the Treasury Department pursuant to said statute. For reasons which the Shipping Board considered sufficient, the Commercial National Bank was not willing to furnish government bonds as collateral, so the Board accepted deeds of trust on real property in the District of Columbia, including the land and building on and in which the bank in question is located. The appraised value of the security which was furnished, far exceeds the average balance of the bank account, so the deposit is believed to be properly safeguarded."

From the foregoing, we think it is clear that neither this Court in its various decisions as to the nature of the Fleet Corporation, the Congress of the United States nor the Shipping Board, considered the funds of the Fleet Corporation as public money of the United States within the meaning of any of the statutes dealing with this subject.

It might also be added that Regulation D of the Federal Reserve Board, series of 1930, effective October 31, 1930, for the government of members banks does not classify deposits of the Merchant Fleet as public money of the United States. Sub-division g of Section II of this Regulation provides:

"(g) Government deposits. The term 'Government deposit' shall mean deposits of public moneys by the United States in designated depositaries."[1]

The footnote to this provision provides:

[1] "The following classes of deposits, however, are *not* Government deposits within such meaning and are *not* exempt from reserve requirements.'

"(1) Deposits of Philippine funds made by the Philippine Government and carried under the title, 'Treasurer of the Philippine Islands currency reserve fund account'.

"(2) Deposits of Porto Rican funds made by the Porto Rican Government.

"(3) Deposits of Indian funds under the control of the Department of the Interior.

"(4) Deposits of States, counties, or municipalities.

"(5) *Deposits of the United States Shipping Board and the Emergency Fleet Corporation.*" (Italics supplied).

As to the Inland Waterways Corporation.

What has been said as to the character of the Fleet Corporation and its funds is equally applicable to the Inland Waterways Corporation, which while engaged in a different type of activity is none the less a Governmental corporation, which like the Fleet Corporation, conducts a business which is not strictly governmental, but is for the most part commercial.

Just as in the case of the Fleet Corporation, the admitted facts in the record disclose that the Inland Waterways Corporation's funds are not subject to the restrictions placed upon public money of the United States. The money in the Inland Waterways accounts with the Commercial National Bank was composed in part of revenue received from the operation of the corporation and in part from the appropriation made by Congress to pay for the stock of the Corporation. (R. 79). The deposits were subject not to the control of the Secretary of the Treasury, but of the Secretary of War, and under the by-laws of the Inland Waterways Corporation its Secretary-Treasurer was the officer

responsible for the money received by the corporation in the conduct of its business.

There Has Been No Compliance by the Fleet Corporation or the Inland Waterways Corporation With Sec. 45 of the National Bank Act (Sec. 90, Title 12, U. S. C.)

There is no need to repeat what has been previously said, ante, pp. 17 to 20, in connection with the requirements of Sec. 45 of the National Bank Act. The terms of the section expressly limit its application to pledges exacted by the Secretary of the Treasury, upon deposits of public money of the United States made by his direction and subject to his control. It is also, of course, obvious that this section applies only to banks designated as depositories of public money by the Secretary of the Treasury. The deposits of the Merchant Fleet Corporation and the Inland Waterways Corporation cannot be considered as public money of the United States as that term is used in Section 45, and also it is admitted that the Commercial National Bank was not designated by the Secretary of the Treasury as a depository of public money (R. 43). These facts alone would be sufficient to negative any allegation that the pledges were authorized by Sec. 45, but an examination of the answers of these two petitioners indicates that no other requirement of Sec. 45 has been met.

Considering first the answer of the Fleet Corporation, we find that on December 1, 1921, its 'Agent' account was opened with the Commercial National Bank (R. 38-39) and on January 14, 1926, its 'Good-Faith' account was opened with said bank (R. 30). Neither of these accounts were secured until December, 1931, which, of course, negatives any idea that they were made by the Secretary of the Treasury pursuant to Sec. 45. When security was finally taken it was the result of negotiations between the representative of the Shipping Board and the bank and approval by the Comptroller of the Currency and not the Secretary of the Treasury (R. 40-41). The record also indicates that

changes in the security were made by the bank with the permission of the Fleet Corporation (Ex. F.-R. 69 and R. 41). Hence, there is no question that the deposit was made by the Fleet Corporation rather than the Secretary of the Treasury (R. 43), and was not subject to the check or control of the Secretary of the Treasury.

In addition to these facts of record, the letter of February 29, 1932, from the Chairman of the Shipping Board to the Comptroller General of the United States, appendix pp. 45-50, previously referred to, clearly indicates that the officials in charge of the Fleet Corporation had no intention of complying literally with Sec. 45 of the National Bank Act, which they realized was limited to public money of the United States, and had no application to the funds which the Fleet Corporation was depositing in the Commercial National Bank. It is also clear that the securities in question were exacted by the Fleet Corporation, subject entirely to the Fleet Corporation's judgment as to what constituted sufficient security and, in fact, were not the type of security required as to deposits of public money made pursuant to Sec. 45. Similarly, as to the Inland Waterways Corporation, it will be noted that it opened a savings deposit account in the Commercial National Bank on July 18, 1930, and a checking account on March 5, 1931 (R. 3, 74), and these deposit accounts were secured pursuant to express agreements between the bank and the office of the Corporation, these securities being deposited with the Federal Reserve Bank in Richmond, Virginia, subject to the Inland Waterways Corporation order, and control (R. 74).

The demand for security was made pursuant to the by-laws of the Inland Waterways Corporation, promulgated by the Secretary of War who approved the deposit of the Corporation's funds in the Commercial National Bank, and required the Secretary-Treasurer of the Inland Waterways Corporation to exact security for the deposit (R. 75).

These facts which are set forth in this petitioner's answer leave no doubt that the deposit and the pledge of assets

securing it were altogether outside of Sec. 45 of the National Bank Act, and that the Secretary of the Treasury had nothing to do with either the deposit or the pledge securing the same.

II.

The Deposits Made by the Merchant Fleet Corporation and the Inland Waterways Corporation in the Commercial National Bank Were Lawful, and Did Not Create a Relationship of Trustee and Cestui Que Trust.

The preceding sections of this brief have dealt with the legality of the pledges of assets made by the Commercial National Bank to secure the deposits of the various petitioners and, therefore, have related entirely to property of the bank which respondent is seeking to recover from these petitioners. It is suggested by petitioners, however, as to the Merchant Fleet Corporation and the Inland Waterways Corporation that the original deposits made in the Commercial National Bank might be considered as illegal, and, that if so, they were held by the bank as trustee.

This suggestion is discussed on pages 62-73 of petitioners' brief, and as a result of this discussion petitioners ultimately conclude that the deposits were legal, but suggest several statutes which they submit to the court for consideration. At the outset it will be noted that all of these statutes deal with public money of the United States, and as we have shown, one of the chief purposes for the formation of the Merchant Fleet and Inland Waterways Corporations was to allow them to conduct their fiscal affairs free from the restrictions placed upon public money of the United States, and we have pointed out the distinction between public money of the United States and money in which the United States has merely an ultimate beneficial interest.

Because of the character of these two corporations' activities, and the purposes for which they were formed, we submit that their funds are entirely outside of the purview of

any of the statutes dealing with public monies of the United States, which require such monies to be covered into the Treasury of the United States.

In *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549, the Fleet Corporation brought a claim against a bankrupt estate, claiming priority under Sec. 3466 of the Revised Statutes of the United States, which grants priority to debts due the United States in insolvent estates. This court recognized the distinction between a claim (which, of course, is property) owned by the Fleet Corporation and a direct claim of the United States, made by it, on its own behalf.

In connection with the claim of priority, the court said at page 570:

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation in the District of New York, under a contract similar to that last described, made by the Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the Referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred."

Turning to an examination of the specific Acts which petitioners suggest as raising the question of the legality of the various deposits, we shall consider first R. S. Sec. 5497, 18 U. S. C., Sec. 182, which is set out in full in the appendix hereto, page 9. This statute makes it unlawful for an unauthorized depositary of public monies to receive from any agent "any public money on deposit."

As we have pointed out previously in this brief, ante., pages 13 to 17, Congress has established a plan for the receipt and custody of public money of the United States, and has required such money to be covered into the Treasury or placed in authorized depositaries of public money. To insure compliance with these requirements, provision has been made in the Criminal Code for penalties upon those who fail to comply with the statutory requirements. Sec. 182 of Title 18 makes the banker, broker or other person unlawfully receiving a deposit of public money guilty of embezzlement.

The preceding sections of the Code (e.g., Sec. 173, 174, 175) are restrictions upon the officers of the United States having public money in their possession. Manifestly, Sec. 182 must be read in the light of both the other criminal provisions and the statutes dealing with the handling of the public money of the United States, and since, as we have shown, money of the Merchant Fleet Corporation and the Inland Waterways Corporation is not public money of the United States within the meaning of these statutes, Sec. 182 does not apply.

Nor do we think there is any basis for contending that either the Merchant Fleet Corporation or the Inland Waterways Corporation was prohibited from putting their money in banks just as a private corporation can.

Sec. 182 of Title 18 U. S. C. is the only statute which is suggested by petitioners as invalidating the deposits of the Inland Waterways Corporation, and we think it is clear that the conclusion reached on pages 64-65 of petitioners' brief, that this section of the Criminal Code has no application to the deposits of the Inland Waterways Corporation, is correct. For the same reasons we think it has no application to the deposits made by the Fleet Corporation.

As to the Fleet Corporation petitioners further point out that in 1923 that corporation formally conveyed its personal property to the United States and it is said that the money deposited by the Corporation in its "Agent deposit account"

was proceeds of the sale of various property belonging to the United States, and which had come into the corporation's hands as agent. These funds, petitioners contend, therefore, are of a type which the statutes of the United States require to be covered into the Treasury. We think that the decisions of this court dealing with the nature of the Fleet Corporation, which have been fully discussed on pages 62 to 70, leave no doubt that the funds of the Fleet Corporation are not required to be covered into the Treasury, but any doubt on this score is completely eliminated by an examination of various appropriation acts of Congress dealing with the Fleet Corporation.

In every appropriation act since 1920, Congress has appropriated the money which the Fleet Corporation received in the course of its operations to the use of the Fleet Corporation, which, of course, eliminated any requirement that this money be covered into the Treasury. With this in mind, it is clear that R. S. 3617 (31 U. S. C. Sec. 484) has no application. This Section provides:

> "The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department."

We call attention to the words "except as otherwise provided" and point out that Congress did otherwise provide as to money received by the Fleet Corporation from the sale of Government property since the appropriation acts made such money available to the Corporation to meet its operating expenses. In short, money which the Fleet Corporation received from the sale of Government property and not by it covered into the Treasury was, because of the appropriation acts, not received "for the use of the United States" but for the use of the Fleet Corporation.

The same comments which have been made as to Sec. 3617 apply to the other statutes set out by petitioners in this connection. The appropriation acts of Congress, set forth in the footnote, below, by expressly making the proceeds of the sale of vessels and other property in liquidation available to the Fleet Corporation as corporate funds for the purpose of meeting its operating and other expenses, constitute express statutory authority exempting the proceeds from the statutes referred to by petitioners.

As is shown by its letter of August 19, 1931, and its letter of February 29, 1932, to the Comptroller General of the United States, appendix pp. 45-50, the U. S. Shipping Board did not consider the monies of the Fleet Corporation as in any way subject to the statutes requiring public money to be covered into the Treasury, and felt that the appropriation acts, by making the funds derived from the sale of vessels and other property in liquidation available to the Fleet Corporation for the conduct of its activities, clearly relieved this money from any requirement that it be covered into the Treasury of the United States.

This conclusion, of course, is implicit in the decision of *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1. which held that the monies of the Fleet Corporation were not required to pass through the General Accounting Office, as is the case with public money of the United States, and were not subject to the usual restrictions imposed upon the handling of public monies of the United States.

In view of the appropriation acts* making the funds here in question available for the Fleet Corporation, for use in the conduct of its activities, and in view of the nature of

* Congress, in the Merchant Marine Act of June 5, 1920, c. 250, Sec. 14, 41 Stat. 993, provided that the net proceeds derived by the Shipping Board prior to July 1, 1921, from its activities should be covered into the Treasury "except such an amount as the Board shall deem necessary to withhold as operating capital" and that, "After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and con-

this Corporation, as set forth in the decisions of this court previously referred to, it is clear that the legality of the deposits in the Commercial National Bank does not stand upon any implied ratification by Congress in disposing of the interest thereon, but was expressly authorized by Congress in the creation of the Fleet Corporation, and in the subsequent appropriation acts making available to the Corporation the funds, deposited in the Commercial National Bank.

CONCLUSION.

It is respectfully submitted that the decision of the court below holding the pledges in the instant case invalid and affirming the judgment against petitioners was correct and should be affirmed.

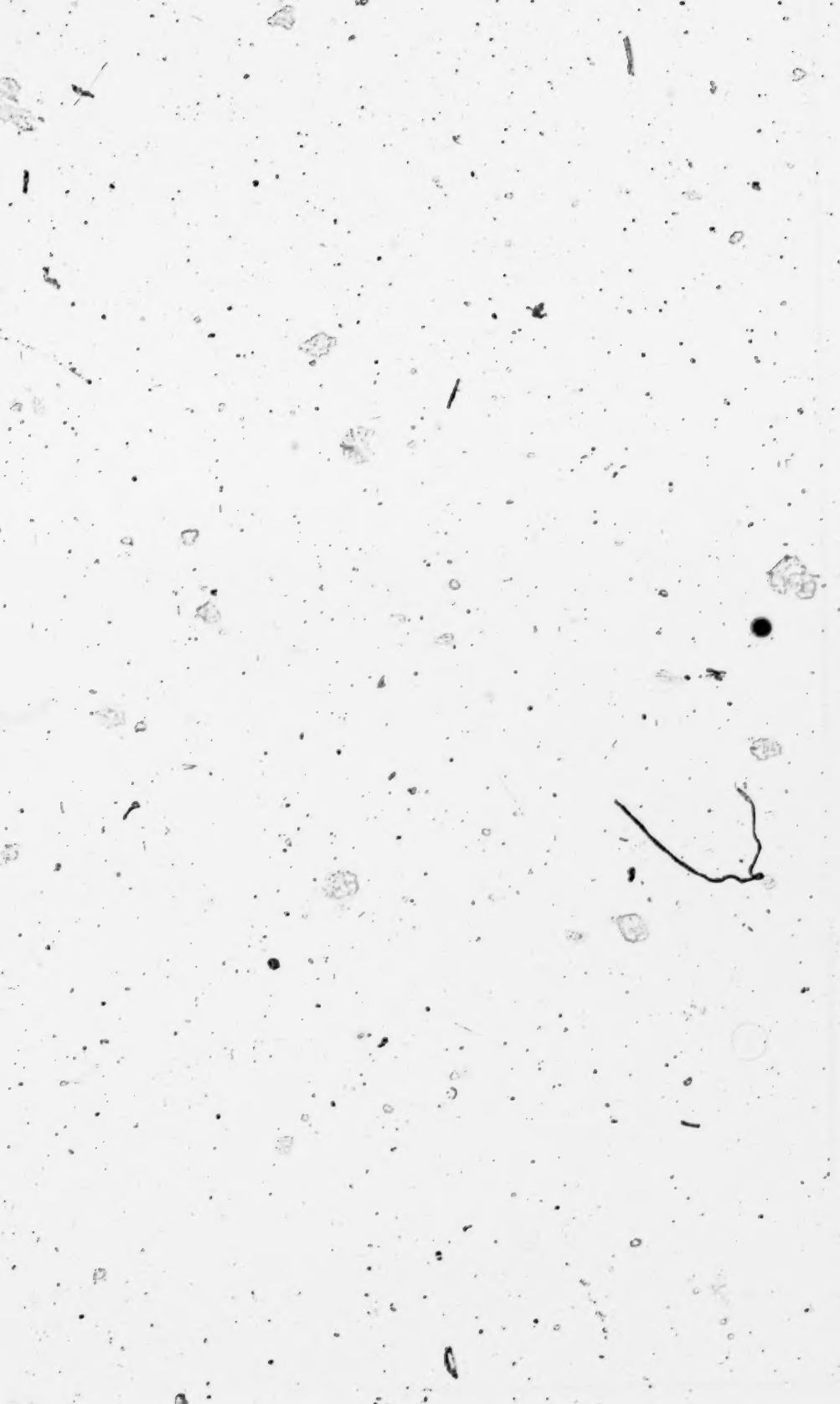
Respectfully submitted,

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struction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts." Coincident therewith, and by subsequent annual appropriation acts, Congress made available to the Merchant Fleet Corporation funds to carry out its corporate purposes. Petitioners suggest that the legality of the deposits results from the Acts of Congress making the interest earned on the funds deposited in the bank available to the Corporation. Obviously, the legality of the deposits must be considered in the light of the Merchant Marine Act of 1920 and the annual appropriation acts which made funds available to the Merchant Fleet for its corporate purposes. The interest statutes merely removed any doubt that might have existed as to the necessity of covering the interest earned on their deposits into the Treasury.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 6

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, *Petitioners*,

v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

APPENDIX FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 6

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, *Petitioners*,

v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

APPENDIX FOR THE RESPONDENT.

PART A.

National Bank Acts.

U. S. C., Title 12, Sec. 24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in

the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession from February 25, 1927, or from the date of its organization if organized after February 25, 1927, until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or a special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without

recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations issued under authority of Chapter 7 of this title, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation, or obligations which are insured by the Federal Housing Administrator pursuant to Section 1713 of this title, if the debentures to be issued in payment of such insured obligations are guaranteed as to principal and interest by the United States: *Provided,* That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus.

The restrictions of this section as to dealing in investment securities shall take effect one year after June 16, 1933.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking. (R. S., Sec. 5136; July 1, 1922, c. 257, Sec. 1, 42 Stat. 767; Feb. 25, 1927, c. 191, Sec. 2, 44 Stat. 1226; June 16, 1933, c. 89, Sec. 16, 48 Stat. 184; Aug. 23, 1935, c. 614, Sec. 308, 49 Stat. 709.)

U. S. C., Title 12, Sec. 90. Depositaries of public moneys and financial agents of Government.

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (R. S.

Sec. 5153; Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809.)

U. S. C., Title 12, Sec. 91. Transfers by bank and other acts in contemplation of insolvency.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S. Sec. 5242.)

U. S. C., Title 12, Sec. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. Sec. 5236.)

PART B.

Public Money Acts.

U. S. C., Title 5, Sec. 264.

Same; receipts and expenditures of public moneys. It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation. (July 31, 1894, c. 174, Sec. 15, 28 Stat. 210.)

U. S. C., Title 5, Sec. 380.

Revenues and collections. The postal revenues and all debts due the Post Office Department shall, when collected, be paid into the Treasury of the United States under the direction of the Postmaster General, and the Treasurer, Assistant Treasurer, or designated depository receiving such payment shall give the depositor a duplicate receipt therefor, to be retained by him in his office as a voucher, and shall forward the original to the Bureau of Accounts in the Post Office Department, to be placed to the credit of the depositor in audit of his accounts by the General Accounting Office. (R. S., Sec. 407; Jan. 22, 1894, c. 17, 28 Stat. 28; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.)

U. S. C., Title 18, Sec. 173.

(Criminal Code, Sec. 87.) Disbursing officers unlawfully using public money. Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depositary, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited,

withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both. (R. S. Sec. 5488; Mar. 4, 1909, c. 321, Sec. 87, 35 Stat. 1105.)

U. S. C., Title 18, Sec. 174.

(Criminal Code, Sec. 88.) Failure of depositaries to safely keep public deposits. If the Treasurer of the United States or any assistant treasurer, or any public depositary, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other persons having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years. (R. S. Sec. 5489; Mar 4, 1909, c. 321, Sec. 88, 35 Stat. 1105.)

U. S. C., Title 18, Sec. 175.

(Criminal Code, Sec. 89.) Unlawful use of public moneys by custodians. Every officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys instrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years. (R. S. Sec. 5490; Mar. 4, 1909, c. 321, Sec. 89, 35 Stat. 1105.)

U. S. C., Title 18, Sec. 177.

(Criminal Code, Sec. 91.) Failure to deposit as required. Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depositary of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years. (R. S. Sec. 5492; Mar. 4, 1909, c. 321, Sec. 91, 35 Stat. 1105.)

U. S. C., Title 18, Sec. 178.

(Criminal Code, Sec. 92.) Persons affected. The provisions of Secs. 173 to 177 of this title shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same. (R. S. Sec. 5493; Mar. 4, 1909, c. 321, Sec. 92, 35 Stat. 1105.)

U. S. C., Title 18, Sec. 179.

(Criminal Code, Sec. 93.) Record evidence of embezzlement. Upon the trial of any indictment against any person for embezzling public money under any provision of sections 173 to 178 of this title, it shall be sufficient evidence, prima facie, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money. (R. S. Sec. 5494; Mar. 4, 1909, c. 321, Sec. 93, 35 Stat. 1105.)

U. S. C., Title 18, Sec. 180.

(Criminal Code, Sec. 94.) Prima facie evidence of embezzlement. The refusal of any person, whether in or out of office, charged with the safe-keeping, transfer, or disbursement of the public money to pay any draft, order, or warrant, drawn upon him by the proper accounting officer of the Treasury, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received, or may be held, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, prima facie evidence of such embezzlement. (R. S. 5495; Mar. 4, 1909, c. 321, Sec. 94, 35 Stat. 1106.)

U. S. C. Title 18, Sec. 181.

(Criminal Code, Sec. 95.) Evidence of conversion. If any officer charged with the disbursement of the public moneys accepts, receives, or transmits to the Treasury Department to be allowed in his favor any receipt or voucher from a creditor of the United States without having paid to such creditor in such funds as the officer received for disbursement, or in such funds as he may be authorized

by law to take in exchange, the full amount specified in such receipt or voucher, every such act is an act of conversion by such officer to his own use of the amount specified in such receipt or voucher. (R. S. Sec. 5496; Mar. 4, 1909, c. 321, Sec. 95, 35 Stat. 1106.)

U. S. C. Title 18, Sec. 182.

(Criminal Code, section 96.) Banker receiving unauthorized deposit of public money. Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

U. S. C., Title 31, Sec. 147.

Treasurer; duties. The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned in the General Accounting Office, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid. He shall render his accounts to the General Accounting Office quarterly, or oftener if required, and shall transmit a copy thereof, when settled, to the Secretary of the Treasury. He shall at all times submit to the Secretary of the Treasury and the General Accounting Office, or either of them, the inspection of the moneys in his hands. (R. S. Sec. 305; July 31, 1894, c. 174, Secs. 4, 11, 28 Stat. 205, 209; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.)

U. S. C., Title 31, Sec. 474.

Public moneys subject to draft of Treasurer. All public moneys paid into any depository shall be subject to the draft of the Treasurer of the United States, drawn agreeably to appropriations made by law. (R. S. Sec. 3593.)

U. S. C., Title 31, Sec. 476.

Transfer of duties of assistant treasurers to other officers, etc. The Secretary of the Treasury may, in his discretion, transfer any or all of the duties and functions performed or authorized to be performed prior to May 29, 1920, by assistant treasurers at Boston, New York, Philadelphia, Baltimore, New Orleans, Saint Louis, San Francisco, Cincinnati, and Chicago, or their offices, to the Treasurer of the United States or the mints or assay offices of the United States, under such rules and regulations as he may prescribe, or may utilize any of the Federal reserve banks acting as depositaries or fiscal agents of the United States, for the purpose of performing any or all of such duties and functions, notwithstanding the limitations of Secs. 391 and 392 of Title 12, or any other provisions of law. (May 29, 1920, c. 214, Sec. 1, 41 Stat. 655.)

R. S., Sec. 3617 (31 U. S. C., Sec. 484).

The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department.

R. S., Sec. 3618 (31 U. S. C., Sec. 487).

All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of Coast Guard cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, or of materials, stores, or supplies sold to officers and soldiers of the Army or of the sale of condemned Navy cloth-

ing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of "proceeds of Government property."

U. S. C., Title 31, Sec. 489.

Payment of expenses of sales from proceeds. From the proceeds of sales of old materials, condemned stores, supplies, or other public property of any kind, before being deposited into the Treasury, either as miscellaneous receipts on account of "proceeds of Government property" or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales, as approved by the General Accounting Office, so as to require only the net proceeds of such sales to be deposited into the Treasury, either as miscellaneous receipts or to the credit of such appropriations, as the case may be. (June 8, 1896, c. 373, Sec. 1, 29 Stat. 268; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.)

U. S. C., Title 31, Sec. 492.

Duty of disbursing officers. Except as otherwise provided by law it shall be the duty of every disbursing officer having any public money intrusted to him for disbursement, to deposit the same with the Treasurer or with one of the depositaries of the United States mentioned in Section 476 of this title, and to draw for the same only as it may be required for payments to be made by him in pursuance of law and draw for the same only in favor of the persons to whom payment is made; and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury. In places, however, where there is no treasurer or depositary, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depositary, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors. (R. S. Sec. 3620; Feb. 27, 1877, c. 69, Sec. 1, 19 Stat. 249; May 29, 1920, c. 214, Sec. 1, 41 Stat. 654, 655.)

R. S., Sec. 3621 (31 U. S. C., Sec. 495).

Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: *Provided*, That postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law.

U. S. C., Title 31, Sec. 522.

Transfer of moneys from depositaries to Treasury. The Secretary of the Treasury may, except as provided in Sec. 523 of this title, transfer the moneys in the hands of any depositary of public moneys to the Treasury of the United States to the credit of the Treasurer; and he may transfer moneys in the hands of one depositary to any other depositary, as the safety of the public moneys and the convenience of the public service shall seem to him to require. (R. S. Sec. 3640.)

U. S. C., Title 31, Sec. 526.

Public moneys in Treasury and depositaries subject to draft of Treasurer. All moneys paid into the Treasury of the United States shall be subject to the draft of the Treasurer. And for the purpose of payments on the public account the Treasurer is authorized to draw upon any of the depositaries, as he may think most conducive to the public interest and to the convenience of the public creditors. Each depositary so drawn upon shall make returns to the Treasury and Post Office Departments of all moneys received and paid by him, at such times and in such forms as shall be directed by the Secretary of the Treasury or the Postmaster General. (R. S. Sec. 3644.)

U. S. C., Title 39, Sec. 736.

WHAT TO BE FUNDS. All money received for the sale of money orders, including all fees thereon, all money transferred from the postal revenues to the money-order funds, all money transferred or paid from the money-order funds to the service of the Post Office Department, and all money-order funds transferred from one postmaster to another, shall be deemed and taken to be money-order funds and money in the Treasury of the United States. And it shall be the duty of the Treasurer of the United States or depositary designated by the Secretary of the Treasury under Sec. 476 of Title 31 to open, at the request of the Postmaster General, an account of "money-order funds" deposited by postmasters to the credit of the Postmaster General, and of drafts against the amount so deposited, drawn by him and countersigned by the comptroller of the bureau of accounts in the Post Office Department. (R. S. Sec. 4045; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24; May 29, 1920, c. 214, Sec. 1, 41 Stat. 655.)

PART C.

United States Postal Savings Act.

U. S. C., Title 39, Sec. 759.

DEPOSIT OF FUNDS IN BANKS; INTEREST; RESERVE; SECURITY; DEPOSITS WITH TREASURER OF BOARD OF TRUSTEES. Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than 2¼ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve,

and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. If one or more member banks of the Federal reserve system exists in the city, town, village, or locality where the postal savings deposits are made, such deposits shall be placed in such qualified member banks substantially in proportion to the capital and surplus of each such bank, but if such member banks fail to qualify to receive such deposits, then any other bank located therein may, as hereinbefore provided, qualify and receive the same. If no such member bank and no other qualified bank exists in any city, town, village, or locality, or if none where such deposits are made will receive such deposits on the terms prescribed, then such funds shall be deposited under the terms of this chapter in the bank most convenient to such locality. If no such bank in any State or Territory is willing to receive such deposits on the terms prescribed, then such funds shall be deposited with the treasurer of the board of trustees and shall be counted in making up the reserve of 5 per centum. Such funds may be withdrawn from the treasurer of said board of trustees, and all other postal savings funds, or any part of such funds, may be at any time withdrawn from the banks and savings depository offices for the repayment of postal savings depositors when required for that purpose. If at any time the postal savings deposits in any State or Territory shall exceed the amount which the qualified banks therein are willing to receive under the terms of this chapter, and such excess amount is not required to make up the reserve fund of 5 per centum hereinbefore provided for, the board of trustees may invest all or any part of such excess amount in bonds or other securities of the United States. When, in the judgment of the President, the general welfare and interests of the United States so require, the board of trustees may invest all or any part of the postal savings funds, except the reserve fund of 5 per centum herein provided for, in bonds or other securities of the United States. The board of trustees may in its discretion purchase from the holders

thereof bonds which have been or may be issued under the provisions of Section 760 of this title. Interest and profit accruing from the deposits or investment of postal savings funds shall be applied to the payment of interest due to postal savings depositors, as hereinbefore provided, and the excess thereof, if any, shall be covered into the Treasury of the United States as a part of the postal revenue. Postal savings funds in the treasury of said board shall be subject to disposition as provided in this chapter, and not otherwise. The board of trustees may at any time dispose of bonds held as postal savings investments and use the proceeds to meet withdrawals of deposits by depositors. The word "Territory" as used herein shall be held to include the District of Columbia, the Territory of Alaska, and Porto Rico, and the word "bank" shall be held to include savings banks and trust companies doing a banking business. (Aug. 24, 1912, c. 387, Sec. 1, 37 Stat. 512; May 18, 1916, c. 126, Sec. 2; 39 Stat. 159.)

PART D.

Statutes—Orders and Circulars Relating to Canal Zone.

Panama Canal Statutes.

Act of June 28, 1902, c. 1302, 32 Stat. 481:

> Sec. 2. That the President is hereby authorized to acquire from the Republic of Colombia, for and on behalf of the United States, upon such terms as he may deem reasonable, perpetual control of a strip of land, the territory of the Republic of Colombia, not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, and the right to use and dispose of the waters thereon, and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal, of such depth and capacity as will afford convenient passage of ships of the greatest tonnage and draft now in use, from the Caribbean Sea to the Pacific Ocean, which control shall include the right to perpetually maintain and operate the Panama Railroad, if the ownership thereof, or a controlling interest therein, shall have been acquired by the United States, and also jurisdiction over said strip and the

ports at the ends thereof to make such police and sanitary rules and regulations as shall be necessary to preserve order and preserve the public health thereon, and to establish such judicial tribunals as may be agreed upon thereon as may be necessary to enforce such rules and regulations.

* * * * * * *

SEC. 7. That to enable the President to construct the canal and works appurtenant thereto as provided in this Act, there is hereby created the Isthmian Canal Commission, the same to be composed of seven members, who shall be nominated and appointed by the President, by and with the advice and consent of the Senate, and who shall serve until the completion of said canal unless sooner removed by the President, and one of whom shall be named as the chairman of said Commission. * * *

Act of April 28, 1904, c. 1758, 33 Stat. 429:

SEC. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the Government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

WHITE HOUSE,
Washington, D. C., May 9, 1904.

SIR:

* * * * * * *

Inasmuch as it is impracticable for the President, with his other public duties, to give to the work of supervising the Commission's construction of the Canal and government of the zone the personal attention which seems proper and necessary, and inasmuch as the War Department is the de-

partment which has always supervised the construction of the great civil works for improving the rivers and harbors of the country and the extended military works of public defense, and as the said department has from time to time been charged with the supervision of the government of all the island possessions of the United States, and continues to supervise the government of the Philippine Islands, I direct that all the work of the Commission done by virtue of powers vested in me by the act of Congress approved June 28, 1902, in the digging, construction, and completion of the Canal, and all the governmental power in and over said canal zone and its appurtenant territory, which by virtue of the act of Congress approved April 28, 1904, and these instructions, shall be vested in said Isthmian Canal Commission, shall be carried on or exercised under your supervision and direction as Secretary of War.

Subject to the limitations of law and the conditions herein contained, the Isthmian Canal Commission are authorized and directed:

1. To make all needful rules and regulations for the government of the zone and for the correct administration of the military, civil, and judicial affairs of its possessions until the close of the Fifty-eighth Congress.

2. To establish a civil service for the government of the strip and construction of the Canal, appointments to which shall be secured as nearly as practicable by a merit system.

* * * * * * *

6. To make all needful rules and regulations respecting an economical and correct disbursement and an accounting for all funds that may be appropriated by Congress for the construction of the canal, its auxiliary works, and the government of the canal zone; and also to establish a proper and comprehensive system of bookkeeping, showing the state of the work, the expenditures by classes, and the amounts still available.

* * * * * * *

The commission may legislate on all rightful subjects of legislation not inconsistent with the laws and treaties of the United States so far as they apply to said zone and other places, and the said power shall include the enactment of the sanitary ordinances of a preventive or curative character to be enforced in the cities of Colon and Panama and

which are contemplated and authorized by Article 7 of said Canal Convention. Such legislative power shall also include the power to raise and appropriate revenues in said zone; and all taxes, judicial fines, customs duties, and other revenues levied and collected in said zone by or under the authority of said commission shall be retained, accounted for, and disbursed by said commission for its proper purposes. The members of said commission to the number of four or more shall constitute a legislative quorum, and all rules and regulations passed and enacted by said commission shall have set forth as a caption that they are enacted by the Isthmian Canal Commission "By authority of the President of the United States."

* * * * * * *

All laws, rules, and regulations of a governmental character enacted by the commission hereunder shall be submitted to you for your approval, and should your approval be withheld from any such law, rule, or regulation, then from that time the law, rule, or regulation shall thereafter have no force or effect.

* * * * * * *

The necessary expenses incurred by the commission in carrying on the government of the canal zone will be defrayed from the local revenues so far as the said revenues may be sufficient and the remainder will be met from the appropriation made by the fifth section of the act of Congress approved June 28, 1902. An estimate of the proposed expenditures and revenues for each year in carrying on the government of the zone will be submitted to Congress at the beginning of each annual session.

* * * * * * *

These instructions may be modified and supplemented as occasion shall arise.

Very respectfully,

THEODORE ROOSEVELT.

To

HON. WM. H. TAFT,
Secretary of War.

Order of June 24, 1904, from Secretary of War to the Chairman of the Isthmian Canal Commission:

"The Governor of the Canal Zone is directed to formulate a plan for a practical and efficient postal ser-

vice in said Canal Zone, and including such measures and provisions of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and to report said plan to the Chairman of the Isthmian Canal Commission for such action as the discretion of the Commission shall approve."

1. ACT NO. 8, ENACTED SEPTEMBER 2, 1904

* * * * * * *

By authority of the President of the United States, be it enacted by the Isthmian Canal Commission:

* * * * * * *

SEC. 9. There is hereby created and established the office of Treasurer of the Canal Zone. * * *

He shall receive, safely keep, and duly account for all moneys belonging to the Government of the Canal Zone, from whatever source derived. He shall take proper receipts for all moneys paid or disbursed and give proper receipts for all moneys received by him by virtue of his office.

* * * * * * *

SEC. 42. By Executive Order dated June 24, 1904, provision was made as follows:

> That a post office be established in each of the following named towns of the Canal Zone, to-wit: Cristobal, Gatun, Bohio, Gorgona, Bas Obispo, Empire, Culebra, La Boca, and Ancon. The post offices at Cristobal and Ancon shall be money-order offices.

The post office at Bas Obispo is discontinued, and post offices are hereby established at San Pablo and Matachin.

There is hereby created and established a postal service for the Canal Zone, Isthmus of Panama.

It shall be the duty of the Postal Service to administer the affairs of the post offices and the postal affairs of the Zone.

The Postal Service of the Canal Zone shall be conducted, regulated and controlled by such of the laws, rules, and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact exist-

ing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission.

* * * * * *

SEC. 44. All moneys collected or received by the Director of Posts by virtue of his office shall be deposited forthwith with the Treasurer of the Canal Zone, and a receipt in duplicate therefor issued by the Treasurer to the Director of Posts, who shall attach the original thereof to his monthly account. [Laws of the Canal Zone, Isthmus of Panama, 1906, p. 52 *et seq.*]

4. EXECUTIVE ORDER NO. 1409, PROMULGATED SEPTEMBER 8, 1911

ESTABLISHING THE POSTAL-SAVINGS SYSTEM IN THE CANAL ZONE

By virtue of the authority vested in me, I hereby establish the following Order for the Canal Zone:

SECTION 1. There is hereby established in the post-offices of the Canal Zone a postal-savings system, to be operated without the payment of interest on the deposits under such rules and regulations as may be now or hereafter adopted.

SEC. 2. There is hereby created a Board of Trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Order, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Collector of Revenues of the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal Zone, severally, acting *exofficio*, and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices; the regulations above mentioned to be subject to the approval of the Chairman of the Isthmian Canal Commission.

* * * * * * *

SECTION 5. At least one dollar, or a larger amount in multiples thereof, must be deposited before an account is opened with a person depositing the same; and one dollar, or multiples thereof, may be deposited after such account has been opened. Postal savings deposits will be evidenced by postal savings certificates issued in fixed denominations

of $1, $2, $5, $10, $20, $50, $100, each bearing the name of the depositor, the number of his account, the date of issue, and the name of the depository office.

* * * * * *

SECTION 7. Postal-savings funds received under the provisions of this Order shall be deposited with the Treasurer of the Canal Zone under such regulations as the Board of Trustees may prescribe.

* * * * * *

SECTION 9. That the final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sum deposited by any person with the postal-savings depository, if the same shall not have been appealed from, and the time for appeal have expired, upon submission to the Collector of Revenues of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any state or territory, or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, shall be accepted by the Board of Trustees as conclusive of the title, right, interest, or possession so adjudicated; and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States and the Canal Zone Government from the claim or demand of any person or persons to the same.

* * * * * * *

WM. H. TAFT.

THE WHITE HOUSE,
September 8, 1911.

Act of August 24, 1912, c. 390, 37 Stat. 560:

SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone

by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. 48 U. S. Code 1309.

* * * * * * *

SEC. 4. That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed

by the Government in continental United States. * * * 48 U. S. Code 1305.

* * * * * * *

SEC. 7. That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. * * * 48 U. S. Code 1307.

EXECUTIVE ORDER TO ESTABLISH A PERMANENT ORGANIZATION FOR THE PANAMA CANAL (PUBLISHED IN THE 660 SERIES OF GOVERNOR'S CIRCULARS IN RE GENERAL AND SEPARATE ORGANIZATIONS)

By virtue of the authority vested in me, I hereby enact the following order, creating a permanent organization for the Panama Canal, under the Act of Congress "To provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August 24, 1912 [Sec. 4, Panama Canal Act]

SECTION 1. The organization for the completion, maintenance, operation, government and sanitation of the Panama Canal and its adjuncts and the government of the Canal Zone shall consist of the following departments, offices and agencies, and such others as may be established by the Governor of the Panama Canal on the Isthmus or elsewhere with the approval of the President, all to be under the direction of the Governor, subject to the supervision of the Secretary of War.

* * * * * * *

ACCOUNTING DEPARTMENT

There shall be an Accounting Department under the supervision and direction of the Auditor, with an assistant in the United States [Sec. V, Executive Order of Mar. 2, 1914, p. 162, defines duties of Assistant Auditor in the United States]. The duties of the department shall include all general bookkeeping, auditing and accounting, both for money and property, costkeeping, the examination of payrolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone. These same duties shall be performed for the Panama Railroad Company on the Isthmus when not inconsistent with the charter and by-laws of that Company. The department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the Governor, with the approval of the President. The Auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.,

* * * * * *

SEC. 3. This order shall take effect from and after the 1st day of April, 1914, from which date the Isthmian Canal Commission, together with the present organization for the Panama Canal and the Canal Zone, shall cease to exist, in accordance with the terms of the above-mentioned Act of Congress.

WOODROW WILSON.

THE WHITE HOUSE,
January 27, 1914.

THE PANAMA CANAL

OFFICE OF THE GOVERNOR,
Culebra, C. Z., April 1, 1914.

Circular No. 660-2.

ACCOUNTING DEPARTMENT

AUDITOR OF THE PANAMA CANAL

1. The Auditor of The Panama Canal is charged with the immediate direction and control of accounting, and the auditing and settlement of claims for The Panama Canal and Canal Zone and for the Commissary Department of The Panama Railroad on the Isthmus. He has supervision and control over the acceptance of bonds, the methods of keeping records and accounts of receipts and disbursements of moneys received by all officers and agents of The Panama Canal and Canal Zone by virtue of their offices or positions, and the methods of safeguarding such moneys. He shall prescribe all forms for recording the receipt and disbursement of moneys and property and all forms necessary for use in accounting for money and property, except as otherwise prescribed in accordance with law. He is authorized, and it shall be his duty, to examine the books, contracts, records, and accounts of money and property in the possession of all officers and agents of The Panama Canal and Canal Zone, and of the Commissary Department of the Panama Railroad on the Isthmus. He shall perform all the duties heretofore assigned to the Examiner of Accounts or to the Auditor of the Canal Zone Government, and the additional duties prescribed by the Executive Order of January 27, 1914.

DISBURSEMENTS—PAYMASTER

2. The Paymaster is charged with the payment on the Isthmus of all moneys appropriated for The Panama Canal and expendable under the direction of the Governor. The Paymaster will make payments only on vouchers or pay rolls, time vouchers or pay receipts which have been examined and audited by the Auditor. All collections made by the Paymaster on the pay rolls shall be paid by him to the Collector upon the certificate of the Auditor specifying the amount and the source from which derived, except refund-

ments of overpayments and amounts due The Panama Railroad Company for supplies or services rendered employees, and except other deductions authorized to be made and to be paid to other branches of the service, to contractors or other persons. All other duties performed by the Disbursing Officer of the Isthmian Canal Commission prior to April 1, 1914, will be performed by the Collector.

RECEIPTS—COLLECTOR

3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal.

4. The Collector will render an account for all public moneys of the United States received by him to the Auditor for the War Department, through the Auditor of The Panama Canal. The account will be forwarded to the Auditor of The Panama Canal within ten days after the close of each month, and will be forwarded by the Auditor of The Panama Canal to the Auditor for the War Department within ten days thereafter.

5. All amounts due The Panama Canal or Canal Zone will be collected by the Collector or his deputies whenever practicable. Bonded employees of the various departments and divisions designated by the Auditor may make collections for minor services or sales. In the performance of their duties in connection with receiving, handling, and refunding cash, such employees shall be subject to the direction of the

Auditor. Such bonded employees shall issue receipts in triplicate, giving the original to the party making deposit and sending the duplicate to the Auditor.

* * * * * *

Act of August 21, 1916, c. 371, 39 Stat. 527, 528 (48 U. S. C., Secs. 1324, 1325):

SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.

SEC. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

BY VIRTUE OF THE AUTHORITY VESTED IN ME, I HEREBY ESTABLISH THE FOLLOWING ORDER FOR THE CANAL ZONE

SECTION 1. The Executive Order of September 8, 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed, PROVIDED THAT accounts, opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

SECTION 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.

SECTION 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

THE WHITE HOUSE,
5 September 1914.

Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a):

SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

PART E.

Letters Relative to Opening of Canal Zone Deposits.

ISTHMIAN CANAL COMMISSION,

DEPARTMENT OF
EXAMINATION OF ACCOUNTS,

Empire, Canal Zone, September 19, 1908.

Lieut. Col. GEO. W. GOETHALS,
Chairman and Chief Engineer, Culebra, C. Z.

SIR: The appointment of a Treasurer of the Canal Zone and his entrance upon duty October 1, 1908, brings up the question of the safekeeping of the money of the Canal Zone Government now amounting to more than one million dollars. Since the beginning of the work in 1904 the Disbursing Officer of the Commission has acted as Treasurer of the Canal Zone and for some time past has kept the moneys of the United States and of the Canal Zone in one fund. In order to avoid keeping a total of more than two million dollars in cash in the office building at Empire, the present Disbursing Officer has used the Canal Zone moneys, as

occasion required, in payment of the obligations of the Commission. At the present time he has not a sufficient amount of cash on hand to pay over the money due the Canal Zone and at the same time meet the Commission's obligations. He has, however, a large balance to his credit as Disbursing Officer, with the Assistant Treasurer of the United States at New York. From this balance he can have shipped a sufficient amount of cash to pay over to the new Treasurer of the Canal Zone, the entire amount due, if it is found desirable to do so.

It being important that the moneys of the Canal Zone should be kept separate, such moneys now received by the Treasurer exceeding five million dollars a year, you determined that a Treasurer should be appointed. Mr. Homer A. A. Smith has executed the required bond and will enter upon the duties of the office October 1, 1908.

More than ninety percent of the moneys received by the Canal Zone Government are money-order funds. At this time money-order sales are made at the rate of five million dollars a year. Many employees on the Isthmus purchase money orders payable to themselves at the place of issue and hold them for many months; others purchase them payable to themselves at post offices in the United States. Under its arrangement with the United States Post Office Department the Canal Zone Government pays at the time of issue ninety percent of the face value of orders drawn on the United States. Thus ten percent of the amount of these orders is held until they have been paid by the United States Postal Service. This fund with the balance of the ninety percent always on hand pending the arrival of the time for regular remittance, constitutes a large fund. There is also a fund of about four hundred thousand dollars which represents the value of money orders issued in the Zone and payable in the Zone. This may be said to be the savings of employees who deposit them for safe-keeping.

The experience of the past year has shown that there is not less than seven hundred thousand dollars that is in the nature of a permanent fund, which will remain in the Treasury of the Canal Zone Government, in cash and will not be touched. I think it undesirable to keep this amount in the office building at Empire, if other arrangements can be made. In my opinion it is desirable that the Treasurer have a depository on the Isthmus for the purpose of issuing

checks in payment of accounts when it is found best to pay particular classes of accounts by check.

As the moneys of the Zone are not moneys of the United States, the laws regarding the designation of depositories of public moneys do not apply. The International Banking Corporation is not incorporated under the national banking law of the United States, but it has been used as a fiscal agency in connection with the financial transactions of the War Department in the Insular possessions of the United States. This corporation has branches in the Canal Zone, and for that reason I have the honor to suggest that the Honorable Secretary of War be requested to authorize the making of an agreement with the International Banking Corporation for the deposit with it of approximately seven hundred thousand dollars. I would also suggest, for your consideration, that as the War Department has had dealings with this bank and the main office of the bank is in New York City, it may be best that the negotiations be had between the War Department and the bank, rather than between the Commission on the Isthmus and the bank.

Without knowing anything of the attitude of the bank on the subject I beg to suggest the following brief outline of what I think is desirable from the standpoint of the Canal Zone:

1. The Canal Zone will place on deposit with the bank at New York, or with its branches on the Isthmus for the credit of the New York bank, as the bank may prefer, six hundred thousand dollars or more, subject to the check of the Treasurer of the Canal Zone. To this account the Treasurer would deposit checks on New York received by him from the Disbursing Officer of the Isthmian Canal Commission in exchange for cash and other checks and drafts payable in the United States. The Disbursing Officer pays out about one and one-half million dollars monthly in salaries and wages, and a considerable amount comes back to the Treasurer of the Canal Zone through the post offices. The Treasurer would draw on this account in New York as a rule only to make payments to the Postal Service of the United States. So far as can be foreseen, the balance of this account would for several years never be less than six hundred thousand dollars.

2. The bank should pay interest, at a rate agreed upon, on the average daily balance on deposit in New York, and

if desired by the bank, it would be practicable to give notice of say thirty days, if it be found necessary at some future time to so draw on the account as to reduce the balance below six hundred thousand dollars. The bank should render a monthly statement of deposits and payments, and credits to the Treasurer on Interest Account.

3. The Canal Zone will place on deposit with the bank on the Isthmus one hundred thousand dollars or more, subject to the check of the Treasurer of the Canal Zone, and checks to be payable at any of the branches of the bank on the Isthmus. It is intended that this fund on deposit shall include all moneys not deposited in or to the credit of the bank in New York and not needed by the Treasurer for current cash payments. This fund on deposit on the Isthmus should not bear interest but will not be less than one hundred thousand dollars at any time and would approximate two hundred thousand dollars at the present time.

4. The agreement should be for one year and be renewed from year to year with the option on the part of either the bank or Secretary of War to terminate the agreement on three months' notice; the agreement to be immediately terminated should Congress, by law, direct its termination, or give directions concerning Canal Zone funds inconsistent with it.

5. The bank should furnish security to the satisfaction of the Secretary of War, either in the form of a deposit of bonds or other marketable securities payable to the Treasurer of the Canal Zone, or by the guaranty of three or more surety companies to the satisfaction of the Secretary of War.

Respectfully,

W. W. WARWICK,
Examiner of Accounts.

ISTHMUS CANAL COMMISSION,

PURCHASING DEPARTMENT,

Washington, D. C., October 21st, 1908.

Honorable LUKE E. WRIGHT,
Secretary of War, Washington, D. C.

SIR: I have the honor to forward herewith a letter from Mr. W. W. Warwick, the Examiner of Accounts, relative to

the deposit of Canal Zone funds, which have been separated from the monies covered by Congressional appropriations, and are now in the custody of the Treasury of the Canal Zone.

As noted in Mr. Warwick's letter, the monies of the Zone are not monies of the United States, so that the laws regarding the designation of depositories of public monies do not apply. It is advisable, however, that the funds should not remain in the hands of the Treasurer and also desirable that so much of the monies as are not in constant use should, if possible, draw interest. It would be a matter of great convenience if the company to be made depository have a branch on the Isthmus, thereby eliminating all questions of exchange.

There are on the Isthmus four banks: a branch of the International Banking Company; Isaac Brandon and Brothers, Merchants and Bankers; Ehrman Brothers; and the Panama Banking Company. I forward herewith propositions for the care of these funds from both the International Banking Company and Isaac Brandon and Brothers. It is to be noted that the latter firm is just reorganizing, while the former is a long and well-established banking house. The Examiner of Accounts recommends that the International Banking Company be selected as the depository for the Canal Zone funds and if not inconsistent with public policies, I have the honor to recommend favorable consideration, the arrangements to be entered into with the International Banking Company being similar to those now existing between the War Department and this Company covering the deposit of Philippine funds.

Respectfully,

GEO. W. GOETHALS,
Chairman and Chief Engineer.

Enclosures 3.

PART F.

Merchant Marine Act of 1920—Sec. 14.

U. S. C., Title 46, Sec. 873.

Use and disposition of net proceeds derived from authorized activities; withdrawal of investments. The net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this chapter, or by the preceding chapter, or by the acts specified in Section 862, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of Section 871, and for the insurance fund authorized in Section 869, and for the construction loan fund authorized in Section 870, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by Section 862 and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts. (June 5, 1920, c. 250, Sec. 14, 41 Stat. 993.)

PART G.

Inland Waterways Corporation—Preamble.

INLAND WATERWAYS CORPORATION

Act of June 3, 1924, c. 243, 43 Stat. 360

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the

Government, of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such Act, there is hereby created a corporation, in the District of Columbia, to be known as the Inland Waterways Corporation (hereinafter referred to as the "corporation"). The Secretary of War shall be deemed to be the incorporator, and the incorporation shall be held effected upon the enactment of this Act. The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this Act.

PART H.

Letters as to Status of Merchant Fleet Funds.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 16, 1931.

A-7515.
A-12887.

UNITED STATES SHIPPING BOARD:

GENTLEMEN: It has been the practice of the Merchant Fleet Corporation to maintain accounts in certain banks in the United States designated by the Corporation for the deposit of moneys derived from operation of vessels by the Managing Operators, good faith deposits, receipts from sales and miscellaneous collections.

The vessels and other property in custody of the Board constitute property of the United States, controlled through its agent, the Merchant Fleet Corporation, and moneys derived from the business operations of the Fleet Corporation are moneys of and for the use of the United States. Receipts of the Government go into the General Fund of the Treasury and are available for the general purposes of Government unless the Congress directs that they be set apart for a specific use in a special fund. The fact that the Congress has included the moneys received from operations and sale of property in the appropriation "United States Shipping Board" does not affect or alter their char-

acter but, on the contrary, establishes the fact that such amounts constitute moneys of the United States. Furthermore no provision was made in the Shipping Act of 1916 or Merchant Marine Acts of 1920 and 1928 which would authorize the deposit of Government moneys except as provided by law. Section 3617, Revised Statutes.

It is proposed, therefore, that all domestic collections, other than special deposits, for each fiscal year be deposited into the Treasury to the credit of specified receipt accounts, which may be designated "United States Shipping Board Operating Receipts" and "United States Shipping Board Sales Receipts." Operating receipts so covered in would be placed to the credit of the appropriation "O-551 United States Shipping Board Fund." Sales receipts so covered in would be placed to the credit of two funds—"Liquidation Fund" from which expenses of liquidation may be paid within limitations of the appropriation act and "O8557 Construction Loan Fund, United States Shipping Board." Special deposit collections would be deposited in the disbursings officer's official checking account with the Treasury. All disbursements would be made by disbursing officer's checks drawn on the Treasurer of the United States against advances made them on accountable warrant.

It is requested that the matter be given consideration and this office advised as to the views of the Board.

Respectfully,

(Signed) J. R. McCarl,
Comptroller General of the United States.

UNITED STATES SHIPPING BOARD

August 19, 1931.

The Honorable
The Comptroller General of the United States,
Washington, D. C.

Sir:

Acknowledgement is made of your letter of the 16th ultimo with reference to the deposit of monies by the Merchant Fleet Corporation in banks in the United States, which monies were derived from the operations of vessels, good

faith deposits, receipts from sales, and miscellaneous collections.

It is noticed that you maintain that all monies derived from the business operations of the Merchant Fleet Corporation cannot be handled or deposited except as provided by Section 3617 of the Revised Statutes, and the inference to be drawn from your letter is that all monies not so handled are not handled in accordance with the law. It is also noticed that you suggest that all *domestic* collections other than special deposits be deposited into the Treasury of the United States to the credit of specified receipt accounts designated by different names and that these accounts would then be subject to check of the Disbursing Officers.

It is the position of the United States Shipping Board and the Merchant Fleet Corporation that the method of handling all monies received from the operation of merchant vessels and trade routes, from the liquidation of the war-time program, and from every other source have been at all times strictly in accordance with the statutory authority conferred by Congress, and that the procedure of the Merchant Fleet Corporation questioned by you in your letter is not only entirely in accordance with the present law but is consistent with good business and commercial practice and works to the greatest benefit of the United States Treasury.

A reading of Section 3617 of the Revised Statutes referred to by you clearly discloses that that Section has no application to the great bulk of the monies to which you refer and it is submitted that wherever that Section has had application to any of the monies received by the Merchant Fleet Corporation or the Shipping Board it has been strictly complied with.

As to all War Emergency Legislation, the Comptroller of the Treasury on December 12, 1919, rendered an opinion that neither the working capital of the Fleet Corporation nor monies turned over to it from the Emergency Shipping Fund, nor the net proceeds derived from its activities were monies of the United States which were required to be deposited in the Treasury or in a designated depository as public monies.

Nothing has been found in any of the Appropriation Acts passed subsequent to June 5, 1920, or in the Merchant Marine Acts of 1920 or 1928 which shows that Congress

intended that monies to be derived from the operation of ships, from the sale of property, or from other sources should be treated as monies of the United States covered by Section 3617 of the Revised Statutes. In fact a study of those Appropriation Acts clearly shows that Congress had no such intention.

The Merchant Marine Act of 1920, which was practically a revision of all previous laws on the subject of the Merchant Marine and which was really the charter upon which the Shipping Board and the Fleet Corporation have acted since 1920, places the responsibility for the operation of the ships, the establishment of trade routes, the sale of the ships, trade routes and other property, the establishment of an insurance fund, and of a construction loan fund out of "net revenues from operations and sales" and "revenue from sales and operations" respectively, upon the United States Shipping Board. The Fleet Corporation was continued in existence and was given authority to act as the agent of the United States Shipping Board until all vessels should be sold.

Section 14 of the Merchant Marine Act 1920 should be read in connection with the Appropriation Act which was passed on the same date as that Act, namely June 5, 1920, and in connection with all subsequent Appropriation Acts. Section 14 is as follows:

> "Sec. 14. That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the 'Shipping Act, 1916', or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the

United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts."

It will be noticed that this Section refers to "net" proceeds and that only those proceeds not required for the particular purposes mentioned in the Section should be covered into the Treasury of the United States.

Section 3617, to which you have referred, applies to gross revenues and not to net.

The Appropriation Act of June 5, 1920, contains the following:

"The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction, shall be paid from the following sources: (a) The amount on hand July 1, 1920; (b) The amount received during the fiscal year 1921 from the operation of ships; (c) not to exceed $15,000,000 from deferred payments on ships sold prior to the approval of this Act; (d) not to exceed $25,000,000 from plant and material sold during the fiscal year 1921; and (e) not to exceed $30,000,000 from ships sold during the fiscal year 1921."

It is perfectly apparent from Section 14 above quoted and the Appropriation Act passed June 5, 1920, that the Shipping Board was authorized to withhold such amount as it should deem necessary as operating capital for the purposes mentioned in the Merchant Marine Act, and that it was authorized to expend, and consequently keep in its possession, the amount received during the fiscal year from the operation of the ships.

The Appropriation Acts which followed that mentioned above are all very similar down to the year 1928. In the

Appropriation Act for the year ending June 30, 1929, approved May 16, 1928, the following provision appears:

> "(e) All interest earned on the funds, excepting the construction loan fund, of the United States Shipping Board Merchant Fleet Corporation is to accrue to these funds and is made available for the purposes hereinbefore set forth subject to the limitations herein established."

This is a clear indication that Congress was fully cognizant of the practice of the Merchant Fleet Corporation to retain in its possession for the purpose of expeditious payment of bills the funds derived by it from its various sources, and authorized it not only to follow this practice and so retain the funds but also authorized it to retain the interest earned by these funds while so retained.

A study of the decisions of the Supreme Court of the United States discloses that that Tribunal has maintained that the Fleet Corporation is a separate and distinct entity and although it handles money and property of the United States is not subject to the same laws, rules and regulations with regard to those monies and properties as govern monies of the other departments and independent branches of the Government. These decisions have already been called to your attention and it seems unnecessary to go into them extensively again. Sloan Shipyards v. U. S. S. S. E. F. C. 258 U. S. 549. Skinner & Eddy v. McCarl, 275 U. S. 1. U. S. S. B. M. F. C. v. P. Leroy Harwood, Trustee, 281 U. S. 519.

For your convenience, however, I quote from the opinion in the McCarl case Supra, the following excerpt:

> "At no time, during the War, or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the General Accounting Offices of the Government, or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General. The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during Federal Control, have been audited, and the control over their financial transactions has been exercised, in accordance with

commercial practice, by the Board or the officer charged with the responsibilities of administration. Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."

Mr. Justice Brandeis, who delivered the above opinion cited a number of the Appropriation Acts and included not only those passed during the War but also those passed up to March 3, 1925.

Every effort has been made to work in harmony with the Treasury Department and to draw funds from the Treasury Department only when needed and to use so far as possible the Treasury Department as a depository. It is submitted that to follow out the suggestion contained in your letter would accomplish no result other than to greatly delay the handling of the business by the Fleet Corporation and increase the work of the Treasury Department by placing upon that Department the work now performed by banks.

It is noticed that even you make a distinction between the funds collected in the United States and those collected abroad and your suggestion as to the handling of the funds only applies to those collected in the United States. You thereby admit that Section 3617 of the Revised Statutes really has no application to the funds in question and you also admit that the funds collected in foreign countries could not be handled as you suggest. The same reason for not handling the foreign funds as you suggest applies to the domestic funds with equal force.

As a matter of information, it may be stated that whereas on June 30, 1928, the Merchant Fleet Corporation maintained 172 bank accounts in the total sum of $13,087,238.94, on June 30, 1931, the number had been reduced to 43 accounts of a total of $3,649,694.81, thereby showing a reduction of 129 bank accounts, and a decrease in balances maintained of $9,437,544.13.

Respectfully,

T. V. O'Connor,
Chairman.

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, February 8, 1932.

UNITED STATES SHIPPING BOARD.

SIRS: There has been received your letter of August 19, 1931, in reply to office letter dated June 16, 1931, relative to the practice of depositing public moneys in banks by the Merchant Fleet Corporation.

Since receipt of your letter copies of resolutions adopted by the Board on November 4 and 11 and December 9, 1931, have been received. Resolution adopted November 4, 1931, provides:

> WHEREAS, monies of the United States have been deposited in divers banking institutions by the Merchant Fleet Corporation; and
>
> WHEREAS, it is provided under Title 12, Section 90, of the Compiled Statutes, that the Secretary of the Treasury shall require all national banking institutions who are acting as financial agents of the Government to give satisfactory security by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them; and
>
> WHEREAS, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress;
>
> RESOLVED, that all banks and banking institutions which have or shall have monies of the United States in the name of the United States Shipping Board Merchant Fleet Corporation be and they are hereby required as a condition of the said deposit to give satisfactory security to said Merchant Fleet Corporation by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as depositaries of such monies.
>
> FURTHER RESOLVED, that the Treasurer of the United States Shipping Board Merchant Fleet Corporation be and he is hereby authorized and required to address to each one of the said banks and banking institutions now having such monies on deposit, a

letter in the form hereto attached enclosing a form of deposit agreement, and as a condition for the continuance of said deposit the said Treasurer of the said Merchant Fleet Corporation is authorized and directed to require the signing of an agreement in the form attached hereto, and the deposit by such depositary of United States Bonds in adequate amounts as collateral for the repayment of the amount of each deposit in each bank and banking institution, respectively.

It thus appears to be admitted by resolution of the Board that all moneys deposited in banks in the name of the United States Shipping Board Merchant Fleet Corporation are moneys of the United States, which is in accord with letter of June 16, 1931, A-7515.

Section 14 of the Merchant Marine Act, 1920, 41 Stat. 988, provides:

> That the *net* proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act, except such an amount as *the board shall deem necessary to withhold as operating capital*, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, *less such an amount as may be authorized annually by Congress to be withheld as operating capital*, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

The provision as to receipts subsequent to July 1, 1921, "less such amount as may be authorized annually by Congress to be withheld as operating capital," is not considered as granting authority to deposit such moneys in banks, but merely for the withholding of certain funds from deposit into the Treasury of the United States as "miscellaneous receipts."

The following provisions of law are pertinent in connection with the points raised in your letter:

> The gross amount of all moneys received from whatever source to the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department" (Section 3617, Revised Statutes).
>
> The Secretary of the Treasury may designate such depositaries of public moneys in foreign countries and in the territories and insular possessions of the United States as may be necessary for the transaction of the Government's business, under such terms and conditions as to security and otherwise as he may from time to time prescribe: Provided, That in designating such depositaries American financial institutions shall be given preference wherever, in the judgment of the Secretary of the Treasury, such institution is safe and able to render the service required" (42 Stat. 692).
>
> All collectors and receivers of public money of every description, within the District of Columbia, shall, as often as they may be directed by the Secretary of the Treasury or the Postmaster General so to do, pay over to the Treasurer of the United States, at the Treasury, all public moneys collected by them or in their hands * * *. It shall be the duty of the Secretary and Postmaster General, respectively, to direct such payments by the collectors and receivers * * * at least as often as once in each week, and as much oftener as they may think proper (Section 3615, Revised Statutes).
>
> Every person who shall have moneys of the United States in his hands or possession, and disbursing of-

ficers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: Provided, That postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law. (Section 3621, Revised Statutes; 29 Stat. 179; 41 Stat. 654-655.)

Title 12, section 90, of the Compiled Statutes, referred to in the resolution, *supra*, has reference to the powers of the Secretary of the Treasury in the designation of national banking institutions as public depositaries, and does not confer on any other branch or establishment of the Government any powers as to designation and amount or class of security to be required of depositaries.

The court decisions cited in your letter, *Sloan Shipyards* v. *U. S. S. B. E. F. C.*, 258 U. S. 549, *Skinner & Eddy* v. *McCarl*, 275 U. S. 1, and *U. S. S. B. M. C.* v. *Leroy Harwood, Trustee*, 281 U. S. 519, hold in substance that the Merchant Fleet Corporation is a separate entity, bound by and subject to suit in connection with its corporate acts.

The provisions contained in the current and certain prior appropriation acts covering the availability of interest earned on funds of the Merchant Fleet Corporation and its accrual to these funds is not construed as authorizing such funds to be kept in the possession of the corporation and invested or deposited in banks not officially designated depositaries of the United States, in violation of the specific acts above quoted. Such provisions appropriate the interest which has accrued on bank deposits already made under the irregular practice; for the purposes mentioned in said appropriation acts, and may not be said to sanction or authorize the continuance of such practice.

The resolution adopted by the Board on December 9, 1931, approves a certain deposit agreement between the Merchant Fleet Corporation and the Commercial National Bank, Washington, D. C., accepting as security for the deposit balance notes secured by deeds of trust on real

property in the District of Columbia. Inasmuch as it is admitted that the funds in the hands of the Merchant Fleet Corporation are public moneys, it is held that the general statutes applicable to the safeguarding of such public moneys are applicable in the absence of specific legislation to the contrary. Expenses of the Fleet Corporation are now being paid by Treasury checks in Washington, and there appears no necessity for maintenance of the account with the Commercial National Bank.

Whether or not compliance with statutory law will increase or diminish the burdens of a department or establishment of the Government is a matter for submission to the Congress for its consideration.

It is therefore requested that the matter be given further consideration and this office advised as to the action taken.

Respectfully,

(signed) J. R. McCarl,
Comptroller General of the United States.

UNITED STATES SHIPPING BOARD

February 29, 1932.

The Honorable
The Comptroller General of the United States,
Washington, D. C.

Sir:

Receipt is acknowledged of your letter of the 8th instant, relating to bank deposits maintained by the Merchant Fleet Corporation.

Discussion of the legal right of the Merchant Fleet Corporation to maintain bank accounts has been continued for several years and although the Shipping Board has made earnest efforts to answer the questions you have raised from time to time, in reports to the Congress, and in letters you have addressed to the Board, we appear to have made little or no progress in satisfying you of our right to carry in banks a part of the funds of the Merchant Fleet Corporation. The point at issue, therefore, appears to be one on which there is a substantial difference of opinion between us and in connection with which little may be gained by continuing an interchange of views, which of necessity, must always be based on the same fundamental facts.

While we feel that little may be accomplished by repeating the arguments previously presented in our letter of December 12, 1930, addressed to the Speaker of the House of Representatives in reply to your report to the Congress, dated September 30, 1929, and also in our letter to you of August 19, 1931, replying to yours of June 16, 1931, we desire at this time to discuss several points which you have raised in your letter of February 8, 1932.

You quote a resolution adopted by the Shipping Board on November 4, 1931, and make the following statement:

> "It thus appears to be admitted by resolution of the Board that all moneys deposited in banks in the name of the United States Shipping Board Merchant Fleet Corporation are moneys of the United States * * *"

By reason of the fact that complete ownership of the capital stock of the Merchant Fleet Corporation rests in the United States, it is apparent that in the final analysis, funds of the Corporation are moneys of the United States, and this fact the Shipping Board has never denied. We do believe, however, and in this belief are supported by decision of the Comptroller of the Treasury of the United States of December 12, 1919, which has previously been brought to your attention, that moneys of the Merchant Fleet Corporation are *not* moneys of the United States which are required to be deposited in the Treasury or in a designated depository as public moneys.

In adopting its resolution of November 4, 1931, the Shipping Board had in mind the desirability of obtaining security for its various bank deposits during the present period of economic disturbance. Since a tried and proved system of collateral deposits for bank accounts had been developed by the United States Treasury, pursuant to Title 12, section 90 of the Compiled Statutes, the Shipping Board decided to follow the same system, and accordingly adopted its resolution of November 4, 1931, the third clause of which indicates such intention, as follows:

> "Whereas, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress."

It will be noted that the word "desire" is used in this resolution, indicating that the Board was prompted by

desire and not by a belief that it was required to comply with said statute.

On page 3 of your letter of February 8, 1932, you refer to section 14 of the Merchant Marine Act, 1920, and state the following:

> "The provision as to receipts subsequent to July 1, 1921, 'less such amount as may be authorized annually by Congress to be withheld as operating capital', is not considered as granting authority to deposit such money in banks, but merely for withholding of certain funds from deposit with the Treasury of the United States as 'miscellaneous receipts' ".

In this statement, we cannot concur, because it is our opinion that this act in authorizing retention of "operating capital" by the Merchant Fleet Corporation, contemplated that operating capital would be used by this Corporation in the same way as it would be used by a private corporation, and without the usual restrictions imposed on the handling of public moneys of the United States. It is our belief that Congress in adopting the Shipping Act, 1916, which authorizes the creation of one or more corporations to act as agents of the Shipping Board, intended thus to grant more freedom of action than is usually enjoyed by a government department or establishment and we consider that this belief was confirmed by Congress when it authorized in the 1920 Act the retention of "operating capital" for the use of the Corporation. Since a corporation commonly avails itself of banking facilities in carrying out the purpose for which it is created, we feel that the Merchant Fleet Corporation is fully justified in doing likewise, even without specific statutory authority so to do.

The statutes quoted on pages 3 and 4 of your letter of February 8, 1932, have been given careful consideration, but we do not believe them to be applicable to funds of the Merchant Fleet Corporation for reasons which have been fully covered in previous correspondence and which depend upon our belief that this Corporation is not bound by the regular governmental regulations for handling funds. In this belief, we are supported by decision of the Supreme Court in the case of Skinner & Eddy v. McCarl, 275 U. S. 1, which has previously been called to your attention, but which is again quoted in part as follows:

"Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."

Your statement on page 4 to the effect that Title 12, section 90 of the Compiled Statutes confers powers to the Secretary of the Treasury in the matter of obtaining collateral for deposits in public depositories but does not confer similar powers to other branches or establishments of the government, is noted. We believe, however, that the Shipping Board, while not bound by the requirements of this statute in its decisions in matters concerning funds of the Merchant Fleet Corporation, can hardly be criticized for voluntarily following a procedure established by the Treasury and found by experience to provide satisfactory safeguards for funds deposited in banks.

You further state that the provisions of various appropriation acts which make available for the use of the Merchant Fleet Corporation the interest that accrues on balances in banks "may not be said to sanction or authorize the continuance of such practice" (maintaining deposit in banks). This interpretation is undoubtedly true from a technical viewpoint, but we submit that Congress has, at numerous hearings, been fully informed of the bank accounts maintained by the Corporation and there have been present at these hearings, some of the Members of Congress who were active in the drafting and enactment of the Shipping Act, 1916, and the Merchant Marine Acts of 1920 and 1928. If the maintenance of bank accounts were a practice contrary to the intentions of Congress in the passage of these several shipping acts, we believe that one or more of the Members of Congress present at such hearings, would have called this fact to our attention, but this has not been done. We are encouraged, therefore, in our belief that Congress intended to grant the Merchant Fleet Corporation a certain freedom of action, including authority to use commercial banking facilities if it found such practice to be necessary or desirable.

On page 5, you refer to the deposit in the Commercial National Bank, Washington, D. C., and conclude that there

appears no necessity for the maintenance of this account. This account has been in existence for approximately 10 years, during which the Merchant Fleet Corporation has made full use of the bank's services for collection of checks, notes, letters of credit and other negotiable paper, which might have been handled through the United States Treasury but which we believe have been more expeditiously and economically handled through the Commercial National Bank. The combined facilities of the United States Treasury and the Federal Reserve System are extensive, but collections such as those made through the Commercial National Bank are not the ordinary business of the United States Treasury and, therefore, would be the cause of trouble and expense to the Treasury and delay to the Merchant Fleet Corporation in collecting the money represented by such paper. The Shipping Board is of the opinion, therefore, that it was justified in establishing the account and in continuing to maintain it.

You also offer objections to the nature of the collateral furnished by the Commercial National Bank to secure this account. As previously stated, the Shipping Board does not consider itself bound by the requirements of Title 12, section 90 of the Compiled Statutes, and for this reason believes it was fully justified in accepting as collateral for this deposit, a different form of security than that specified by Circular No. 176, issued by the Treasury Department pursuant to said statute. For reasons which the Shipping Board considered sufficient, the Commercial National Bank was not willing to furnish government bonds as collateral, so the Board accepted deeds of trust on real property in the District of Columbia, including the land and building on and in which the bank in question is located. The appraised value of the security which was furnished, far exceeds the average balance of the bank account, so the deposit is believed to be properly safeguarded.

We note that your report to Congress, dated January 8, 1932, contains a reference to the bank deposits maintained by the Merchant Fleet Corporation, and states your opinion that these deposits are unauthorized and that the moneys therein should be deposited in the United States Treasury. This condition was similarly set forth in your report to Congress, dated September 30, 1929, and it occurs to the Shipping Board that if Congress concurs in your views and considers that the maintenance of bank accounts is contrary

to law or is undesirable, it will not hesitate to instruct the Shipping Board accordingly.

As rapidly as consistent with the reducing activities of the Merchant Fleet Corporation, the balances in banks and the number of bank accounts are being reduced. Following this policy, large reductions have been made, as is clearly indicated by a comparison of the total of approximately $8,000,000 deposited in banks June 30, 1930, with the corresponding total of $1,621,000 on January 31, 1932.

Respectfully,

(signed) T. V. O'Connor,
Chairman.

PART I.

Philippine Acts.

Act No. 1792 Phil. Comm., Oct, 12, 1907

"The Secretary of War may designate banking institutions in the United States as depositaries of the Government of the Philippine Islands, after they have filed in the Bureau of Insular Affairs of the War Department, Washington, District of Columbia, sufficient evidence of their sound financial condition and deposited bonds of the United States or of the Government of the Philippine Islands or other security satisfactory to the Secretary of War in such amounts as may be designated by him; and no banking institution shall be designated a depositary of the Government of the Philippine Islands until the foregoing conditions have been complied with." Public Laws of the Phil. Is., Vol. VI, pp. 475, 482-483.

Philippine Administrative Code of 1916, Section 656

"The Governor-General may appoint any bank or banking institution in the Philippine Islands, and the Secretary of War any similar institution in the United States, as a depositary of the Government of the Philippine Islands, after such institution has filed sufficient evidence of its sound financial condition and has deposited, as security, either in the Insular Treasury or in the Bureau of Insular

Affairs at Washington, bonds of the United States or of the Government of the Philippine Islands or other bonds or securities satisfactory to and approved by the officer making the appointment and in such amount as shall be required by him (1792-38).

Autonomy Act of Congress—Philippine Islands

"The laws in force in the Philippines on August 29, 1916, shall continue in force and effect, except as altered, amended, or modified by this chapter; until altered, amended, or repealed by the legislative authority provided by this chapter or by Act of Congress of the United States." 39 Stat. 547, 48 U. S. C., Sec. 1004.

APR 18
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 6.

INLAND WATERWAYS CORPORATION, ET AL., *Petitioners*,

v.

FREDERICK J. YOUNG, Receiver of Commercial National Bank of Washington, D. C., *Respondent*.

PETITION FOR REHEARING.

SWAGAR SHERLEY,
CHARLES F. WILSON,
H. B. WEAVER, JR.,
GEORGE B. SPRINGSTON,
Attorneys for Frederick J. Young, Receiver.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING.

Comes now Frederick J. Young, as Receiver of The Commercial National Bank of Washington, D. C., respondent in the above captioned cause, by his attorneys, and submits this, his petition for rehearing of the above cause, and in support thereof respectfully shows:

The doctrine now established by the decision of four justices, with three justices dissenting, which in effect holds that implied power has always existed in national banks to pledge their assets to secure all deposits of moneys of Federal agencies, is so sweeping in scope and so far-reaching in effect that it is earnestly felt by respondent that the interest of the general and unsecured depositors,

not only in the closed banks involved in this particular litigation, but in all national banks throughout the country, justifies the Court in affording an opportunity for this aspect of the matter to be examined anew and presented in a re-argument before these issues shall be finally settled.

I.

Nothing in the Financial Experiences of the Government Prior to the National Bank Act Warrants the Conclusion That National Banks Have a General Implied Power to Secure All Federal Funds Regardless of Character.

The conclusion of the Court, as we understand it, is predicated upon a historic background touching the losses which had been incurred by the Government prior to 1864 in connection with the deposit of public moneys in banking institutions. The Court's reasoning is that because of this experience, one of the chief objects of Congress in passing the National Bank Act was to create banks in which the deposit of public money would be secured by pledge of their assets and hence, Congress not having prohibited by express provision such banks from giving security for other funds, the Court, in construing the powers of the bank, having in mind this purpose, must hold that national banks have an inherent or implied power to secure repayment of all moneys in which the Government is interested, by pledging their assets.

It is respectfully submitted that the complete historic background, as well as that recited by the Court, does not warrant the Court's conclusion as to any such inherent or implied power in national banks.

While it is true that Congress unquestionably was cognizant, from the past history of the country, of the desirability of safeguarding public moneys, in enacting the National Bank Act, yet it is also true that Congress had in mind the accomplishment, not only of this end, but of others

of equal importance to the country, and in choosing ways to effectuate these ends, enacted a code of banking law complete in itself, in which the powers and duties of national banks were given and imposed in detail.

The experiences of the Government both with the first and second Bank of the United States, as well as with state banks of issue, not only as fiscal agents of the Government, but also as depositories of public moneys, as well as its experiences as to the evils frequently flowing from the retention of such moneys in the Treasury and Sub-Treasuries of the United States because of the withdrawal of such funds from the channels of commerce, were such as to make imperative the need of creating a nation-wide system of banks under a central Federal control whose powers and duties should be those and those only that in the judgment of Congress would ensure safe banks of issue, fiscal agents of the Government, available depositories of public money, and also banks of such soundness as to invite and justify their use by the people of the United States as financial institutions and which, in case of disaster, would assure private depositors equality of treatment. Particularly was it necessary to create a sound bank currency, and in connection therewith, to establish a medium for the marketing of Government securities and the re-establishment of Government credit then greatly impaired.

Bitter experience during the panic of 1837 and prior thereto had taught Congress that the securing of public money that might be placed on deposit with banks against ultimate loss was but one of the ends to be accomplished. Congress attempted, and with a large degree of success, the accomplishment of all of the above objectives. It recognized that *ultimate recovery of deposits* from failed banks was not so much to be sought as banks that, by being required to follow wise banking practice, would, in most circumstances, be self-sustaining financial institutions. Accordingly, not simply a law authorizing banks to be incorporated under a general Federal law with a general grant

of powers incident to a bank institution was enacted, but a detailed code, complete in itself, as this Court has declared, was enacted, express powers being given to meet every need as Congress saw the need. Congress did not leave important powers necessary to accomplish the ends indicated to be spelled out as ones necessarily implied.

In particular Congress did not leave the matter of securing public funds to be inferred from the general powers of a national bank. *The Act is not silent in that regard.* The securing of deposits of Government funds found desirable by the history of Government losses prior to 1864, was accomplished by the direct language used in Section 45, wherein Congress gave to the Secretary of the Treasury the right to secure such public funds *but, having a knowledge of good banking practice and of the undesirability of having assets of a bank frozen by being pledged to secure deposits*, it left to the Secretary of the Treasury's discretion the extent to which he should deposit any public money in national banks, what national banks should be designated as depositories of public money, the amount of public money which should be placed in any particular national bank, and the extent and character of the security that should be taken for such deposits as were made in national banks.

We submit that the only natural conclusion that can be drawn from the creation of the banking system is that Congress desired to create a system complete in itself, in which powers and duties were delicately balanced to achieve as fully as possible each desired result *without undue sacrifice of others.* To the extent that assets of a bank should be required to be pledged as security for deposits of public moneys, the liquidity of the banks' assets would be sacrificed and its soundness in time of stress imperiled. Hence it was that Congress placed in the Secretary of the Treasury a sole discretion as to when a bank should be designated a depository and the amount of public money to be placed with it, and the security to be exacted.

Congress did not undertake to provide how much of public funds should be placed with the banks or the allocation among banks in various sections of the country of the amounts so placed; the Government had had bitter experiences as a result of such policy. It proposed to safeguard the public moneys that should be deposited in the national banks, but looked to the Secretary of the Treasury so wisely to exercise his discretion as not to imperil any bank's safety, in order that the Government might in no event suffer a loss.

In 1864, when the National Bank Act was enacted, the express power found in Section 45, giving the Secretary of the Treasury the right to exact security for deposits of public money, was entirely adequate to take care of the securing of the Government's funds that the Secretary might cause to be deposited in national banks. The activities of the Government were more strictly confined, and Governmental commercial activities such as those now carried on by the Inland Waterways Corporation, the Merchant Fleet Corporation, and various other Governmental agencies were not considered. Consequently there was no need to give a general power to national banks to secure depsits of money of agencies of the Government.

Now it is said that because of the many activities of the Government, not considered at the time of the passage of the National Bank Act, and the assumed desirability of safeguarding Federal funds other than public moneys as such by pledging assets, the Court is warranted in reading into the Act implied powers as to the securing of such funds and this because of the losses that the Government had suffered touching *public moneys* when such funds had been deposited in state banking institutions without pledged security.

If Congress had felt, as the Court now suggests, that national banks should be permitted to pledge their assets to secure deposits of moneys of Federal agencies created in the great expansion of Governmental activities since 1864,

it could easily have enacted legislation accomplishing this end, as has been done from time to time in connection with the deposits of specified types of Federal funds.

It is manifest that the question of how far the Federal Government should be preferred over general depositors in the liquidation of an insolvent national bank is a delicate one and one which Congress, of necessity, has considered from time to time as to proposed legislation.

Shortly after the decision of this Court in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245 and *Marion* v. *Succeden*, (1934) 291 U. S. 262, the Secretary of the Treasury sent identical letters to the President of the Senate and the Speaker of the House saying that these two decisions created "urgent necessity" for the prompt enactment of an amendment to Section 45 of the National Bank Act which should clearly enable national banks to pledge their assets to secure deposits of funds such as those involved in the instant case and a proposed amendment was attached to each of the said letters (Senate Document No. 175, 73rd Cong. 2d Sess., Appendix page 13). The Secretary's request was laid before both Houses of Congress (1934, 78th Cong. Rec. 7596, 7726), was printed as a Senate Document (No. 175, 73rd Cong. 2d Sess.) and presented to the Senate in session (1934, 78th Cong. Rec. 11466). The amendment was embodied in a bill (S.3558, 73rd Cong. 2d Sess.) which was referred to the banking committee (1934, 78th Cong. Rec. 8154), but the bill was never reported out.

Later in 1934, however, when the Senate was considering another banking bill (S. 3784) which contained nothing on the question of securing deposits, an amendment was proposed from the floor, the purpose of which was to extend somewhat the power of national banks to secure deposits of States and their sub-divisions (78 Cong. Rec. 12058).

In discussing this proposed amendment, the Senator in charge of the banking bill said that the Senate Committee on Banking and Currency was opposed to the general prin-

ciple of National Banks securing deposits of public funds." (78th Cong. Rec. 12058). The entire banking bill failed to pass.

The policy of Congress to protect the deposits of private citizens is also shown in the Banking Act of 1935, which, in amending the provision previously made for the creation of the Federal Deposit Insurance Corporation, not only appropriated a large sum of public money for non-dividend paying stock of the Corporation, but also directed that a greater sum be advanced whenever needed to meet the Corporation's insurance obligations. Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 686, 699, amending Sec. 1(10) of the act of June 16, 1934, 48 Stat. 161, 177 (U. S. C. title 12, sec. 264 (d) (o)). (See title 15, Sec. 606(a)).

It cannot be assumed that the desirability of safeguarding all Federal funds is so great that the Court is warranted in departing from its often expressed declaration

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*"Mr. President, the subject matter covered by the amendment offered by the Senator from Illinois was considered by the Committee on Banking and Currency, and the committee refused to take any action on it, on the ground that *the committee is opposed to the general principle of public deposits having any security and to giving them a preference over the deposits of the ordinary depositor.* Therefore the committee has been unwilling to take any action along this line.

However, it is recognized that there is a practical situation to be met if the national banks are required to compete with State banks, and in many States there are laws permitting securities to be given for public deposits. If national banks are not permitted to meet that competition, and if nothing is done to require State banks to submit to the same inhibition under which national banks labor, the national banks will be at a disadvantage which might well be called an unfair disadvantage.

Furthermore, the Comptroller of the Currency is already under some embarrassment on account of security having been given for public deposits, and it already having been sold in satisfaction of debts, and many of those transactions would have to be unwound if the amendment of the Senator from Illinois were not agreed to.

Therefore, *still protesting against the principle of having any security given at all for public deposits*, I do not think we ought to resist the adoption of the amendment just offered." (Italics added)

that the powers of national banks are such, and such only, as are affirmatively granted. Such a conclusion, we submit, disregards the need and desirability of sound banking practices and, in the interest of safeguarding such funds, sacrifices liquidity of assets and good banking practice, the observance of which *assures solvent banks*. It assumes that had Congress anticipated present activities of the Government and its proprietary interest in the agencies created for carrying out such activities, it would have made provision for the safeguarding of the funds of such agencies by authorizing a pledge of assets. Since Congress did not, it is assumed that its failure to prohibit the securing of such funds by pledge of assets of national banks leaves this Court free to imply powers not granted. With the utmost respect, we submit that this is not to interpret but to make law.

II.

The Legislative Policy of Congress in Refusing to Grant to National Banks a General Power to Secure All Governmental Deposits and Limiting Such Power to Governmental Deposits Provided for by Specific Legislation Has Been Consistently Recognized by This Court in Its Previous Unanimous Decisions.

In its opinion in the instant case this Court recognizes the soundness of the principles announced in its earlier opinions in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245, and *Marion* v. *Sneeden*, (1934) 291 U. S. 262, and states:

> "In view of the thorough consideration which these two cases received and the added weight which they derive from the authority in the field of banking of Mr. Justice Brandeis, the writer of the opinions, *we start with full acceptance of what they decided.*" (Italics added.)

We submit that one of the basic principles followed by this Court in the earlier cases is clearly set forth by Mr.

Justice Brandeis in the *Pottorff case* where, at page 253, it is stated:

> "National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the Act under which national banks are organized constitutes a complete system for their government, *Cook County Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362, 366; *First National Bank* v. *Missouri*, 263 U. S. 640."

After a brief discussion of the *Pottorff* and *Sneeden cases* the opinion in the instant case states:

> "But the function of national banks as depositaries of Federal funds was not before the Court in the Pottorff and Sneeden cases, and the power of the banks in relation to such funds could not have been decided there. That power is the exact issue here. *The solution of this problem, however, must be found by the application of those standards for judgment which were decisive in the former cases.* In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the national banks as fiscal agencies must give meaning *to the silence of the Act.*" (Italics added).

From the above extract from its opinion it will be observed that the Court, while at the outset stating that the standards which it laid down in the *Pottorff* and *Sneeden cases* are controlling in arriving at the solution of the question presented in the instant case, approaches the solution of the issue here presented by adopting the view that, because the National Bank Act is *silent* as to the existence of a power of national banks to pledge assets to secure Federal funds generally it is the duty of the Court to consider the history and purposes of the statute and the traditional policy of the Government in utilizing national

banks as fiscal agencies. The Court points to no ambiguity in the statute in connection with the existence of this power but starts with the premise above quoted that, the Act being silent, the existence of the power may be found in the history of the Act and in the traditional policy of the Government.

We submit that the extract from the *Pottorff* decision above quoted leaves no doubt that if, as this Court states in the instant case, the statutory grant is silent as to the existence of a general power to secure deposits of all Federal funds, *the power is denied.* This clearly appears to be the principle of statutory construction followed by this Court in the *Pottorff* and *Sneeden cases* where the silence of the Act as to the existence of the power there sought to be created by implication was considered as a denial by Congress of the power.

Nor, in our opinion, is this Court's construction of Section 45 of the National Bank Act and the subsequent Acts of Congress in accord with the construction previously placed on these acts by this Court in the *Pottorff* and *Sneeden cases.* In the instant case, the Court construes the statutes as a recognition of an existing power of national banks to make the pledge, whereas in the earlier decisions the Acts were construed not as recognition of an existing power, *but as creating a power* that did not otherwise exist.

In the *Sneeden case, supra,* at page 268, this Court stated:

> "We are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds."

The funds here in question are not within the scope of Section 45 of the National Bank Act and there is no act of Congress specifically requiring these petitioners to exact security or authorizing the bank to furnish such security.

In *Lewis* v. *Fidelity & Deposit Company*, 292 U. S. 559, this Court said:

> "In Texas & Pacific Ry v. Pottorff, 291 U. S. 245, and Marion v. Sneeden, 291 U. S. 262, decided after the entry of judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

We submit that the above quotation is an accurate statement of what this Court decided in the *Pottorff* and *Sneeden cases* and shows that the fundamental question decided in those cases was *the power* of national banks to pledge their assets to secure deposits. A reading of the opinions in those two cases does not, in our judgment, indicate that they were predicated simply upon the character of the deposits there secured but on the contrary, that the basic and fundamental consideration was *the power* of national banks under the National Bank Act to secure *any* deposit.

Respondent respectfully submits that if this Court, as stated in the opinion in the instant case, adheres to the principles announced by a unanimous Court in the *Pottorff* and *Sneeden cases*, it must conclude that the pledges here made were illegal, since Congress did not authorize the pledges and in the absence of such authorization, the power is denied. Where the power is wholly lacking, the issue is not then in doubt, hence custom and usage, no matter how long continued, cannot vitalize void transactions. This Court so held in the *Sneeden case**, recognizing the admitted knowledge and acquiescence of the Comptroller of the Currency in the making of the pledge there involved, and rejecting the position advanced, that the Comptroller's

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* "- - -comptrollers of the currency knew that this was being done; and they assumed that the banks had power so to do. But the assumption was erroneous." *Marion* v. *Sneeden*, 291 U. S. 262, 269.

acquiescence could lend legality to an illegal and unauthorized act. At this point in the opinion in the *Sneeden case*, the Court observed also, that any implied power of national banks to pledge their assets would be contrary to sound banking.

The obvious importance of the issues presented in this case would seem to justify the granting of this petition and re-consideration by this Court.

Respectfully submitted,

SWAGAR SHERLEY,
CHARLES F. WILSON,
H. B. WEAVER, JR.,
GEORGE B. SPRINGSTON,
Attorneys for Frederick J. Young, Receiver.

I hereby certify that this application is presented in good faith and not for delay.

SWAGAR SHERLEY,
Counsel.

APPENDIX.

73D CONGRESS, 2d Session | SENATE | DOCUMENT No. 175

Security of National Banks for Deposits of Public Moneys

Letter From

THE SECRETARY OF THE TREASURY

Transmitting

A Draft of a Bill to Amend Section 5153 of the Revised Statutes, Designed to Clarify the Situation With Respect to the Giving of Security by National Banks for Deposits of Public Moneys

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April 26 (calendar day, April 28), 1934.—Referred to the Committee on Banking and Currency and ordered to be printed

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APRIL 27, 1934.

MY DEAR MR. PRESIDENT: I have the honor to forward herewith a draft of a bill to amend section 5153 of the Revised Statutes, designed to clarify the situation with respect to the giving of security by national banks for deposits of public moneys.

This matter has been the subject of an exhaustive study, and the enactment of the proposed legislation is recommended by the Comptroller of the Currency. I am forwarding herewith a copy of excerpts from a memorandum forwarded to me by him.

If you deem it advisable, it will be appreciated if these proposals can be submitted for consideration through the appropriate channels.

Respectfully yours,

H. MORGENTHAU, JR.,
Secretary of the Treasury.

HON. JOHN N. GARNER,
President United States Senate.

Attached hereto is text of proposed amendment to section 5153 of the Revised Statutes, as amended (U. S. C., title 12, sec. 90), which amendment relates to the designation of depositaries of public money by the Secretary of the Treasury and the giving of security by national banking associations for deposits of public money of the United States and for various other types of deposits made by public officials, consisting of money for which they are accountable under the law by virtue of their official capacity. The essential respects in which this amendment changes the present law is in that it eliminates doubt under recent decisions as to the power of national banks to give security for the protection of deposits of public money belonging to various Government agencies or of money deposited thereby where they are accountable for such money by reason of the official capacity in which held.

The amendment operates with similar effect as to deposits by officers, agents, or employees of the States, Territories, or insular possessions or any public instrumentality or agency thereof, where the depositing official is charged with the custody of and is accountable for such money by virtue of his official position. Provision is made that security heretofore given for the various types of deposits referred to shall be deemed validly given except where heretofore determined to be in violation of the act of June 25, 1930.

There is urgent necessity for the prompt enactment of this legislation, due to recent decisions of the Supreme Court of the United States, particularly two decisions rendered February 5, 1934, in *City of Marion, Illinois*, v. *Sneeden, Receiver*, and *Texas and Pacific Railway Company* v. *Pottorff, Receiver*, in which the Court took the position that national banks have no implied power to give security for deposits of public money, notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency, in conformance to the views expressed by the Attorney General of the United States (in 30 Ops. Atty. Gen. 341), to the effect that the section being amended "is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits than as a grant by implication or authority to give security for Government deposits alone." A large number of national banks have been placed in the

hands of receivers in the past 3 years. Almost all of these banks held deposits of public money for which security had been pledged. Millions of dollars in such deposits belonging to the Philippine Islands, the United States Shipping Board, Emergency Fleet Corporation, United States Housing Corporation, and similar entities were on deposit in these banks under a contract, whereby the bank had pledged collateral security therefor. These pledges were considered valid by this office and these agencies permitted to avoid loss of such deposits through realization upon the collateral held. Unless curative legislation is enacted to cover this situation, it may be the duty of this office as a matter of law to require these various agencies to restore these funds to the receivers of the various banks in which they were on deposit. Creditors of some of the banks are insisting upon such action being taken at this time. If such restoration must be made, then in most cases a substantial loss will be suffered by the depositing unit, which loss will in many instances ultimately fall upon the Treasury. The situation is also urgent from the standpoint of the going national bank, inasmuch as the various depositing units are now on notice as to the possible lack of power in the banks to give security for their deposits, with the result that these banks are threatened with the withdrawal of hundreds of millions of dollars, which no doubt will be deposited in State banks which do under the State law possess power to give collateral security therefor.

The same situation exists with respect to deposits of funds by the States and their various agencies. Generally speaking, there has been a preference given national banks by the depositing officials thereof. The State treasurer of Illinois within the past 10 days has indicated he feels that he must withdraw approximately $54,000,000 from national banks in Illinois, $26,000,000 of which is in two Chicago banks. The legal representatives of various drainage and irrigation districts in California have indicated that unless the law is clarified, they must withdraw some $50,000,000 from national banks in California. When one considers the total amount of such deposits in national banks all over the United States which may thus be suddenly withdrawn, and the consequent forced liquidation of assets which may be required of such banks in order to meet such withdrawals with resulting ill effect upon market conditions, it becomes imperative to avoid such result by having appro-

priate legislation promptly enacted eliminating the difficulty.

I accordingly recommend that appropriate action be taken to have this amendment enacted into law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5153 of the Revised Statutes, as amended (U. S. C., title 12, sec. 90; U. S. C., supp. VII, title 12, sec. 90), is amended to read as follows:

"SEC. 5153 (a). All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections. Notwithstanding the extent, if any, to which the same may not heretofore have been applicable thereto, the provisions of this paragraph, of section 3621 of the Revised Statutes, as amended (U. S. C., title 31, sec. 495), and of the thirteenth paragraph of section 9 of the Federal Reserve Act, as amended (U. S. C., supp., VII, title 12, sec. 332), shall apply to any and all money held by any instrumentality or agency of the United States, or by any officer, employee, or agent of the United States, or of any such instrumentality or agency, in his official capacity, and shall, to the extent designated by the Secretary of the Treasury, apply to any money held by any corporation in which, or in the funds of which, the United States has an interest, or by any officer, employee, or agent of any such corporation, in his official capacity. Nothing in this paragraph shall be construed to affect any powers conferred by section 17 of the Act of March 3, 1911 (U. S. C., title 25, sec. 156), section 28 of the Act of May 25, 1918 (U. S. C., title 25, sec. 162), section 1 of the Act of August 24, 1912, as amended (U. S. C., title 39, sec. 759), section 61 of the Act of July 1, 1898, as amended (U. S. C., title 11, sec. 101), section 3 of the Act of March 3, 1933 (U. S. C., supp. VII, title 11, sec. 101a), and section 5234 of the Revised Statutes, as amended (U. S. C., title 12, sec. 192).

"(b) Any association, upon the deposit with it of any money by any State, or by any political subdivision of any State, or by any officer, employee, or agent of any such State or subdivision, in his official capacity, may give security for the safe keeping and prompt payment of the money so deposited; and, upon such deposit by any public instrumentality or agency of one or more States, or of one or more political subdivisions of any State, or by any officer, employee, or agent of any such instrumentality or agency, in his official capacity, may, with the consent of the Comptroller of the Currency, give such security; but no security shall be given under this paragraph, with respect to any deposit if under the statute law of the State in which such association is located, the giving of security for such deposit by other

banking institutions, in such State is prohibited. As used in this paragraph the term "State" means any State, territory, District, or possession (including the Philippine Islands) of the United States.

"(c) All security for any deposits described in this section heretofore given by any association shall be deemed to have been validly given except where the enforcement of such security has been denied by the Comptroller of the Currency as in violation of the second paragraph of this section (U. S. C., supp. VII, title 12, sec. 90), as in force after June 25, 1930, and prior to the enactment of this paragraph, and no such security, enforcement of which was so denied, shall be deemed to have been validly given."

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1939.

Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office of Panama Canal, Petitioners,

vs.

Frederick J. Young, Receiver of Commercial National Bank, of Washington, D. C.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The question before us is whether a national bank may pledge assets to secure deposits of funds made by governmental agencies, even though they may not be "public money" within the scope of § 45 of the National Banking Act, 13 Stat. 99, 113 (12 U. S. C. § 90).

The deposits in question were made with the Commercial National Bank by three separate governmental agencies—by the Inland Waterways Corporation and the United States Shipping Board Merchant Fleet Corporation,[1] and by the Secretary of War on behalf of the Panama Canal Zone. After the bank's insolvency the present suit was instituted by the receiver, respondent here, for the recovery of the pledged assets or their proceeds to the extent of the amount in excess of the dividends paid to the general depositors. The District Court granted respondent's motion to strike out portions of the petitioners' answers asserting the validity of the pledges. The petitioners stood their ground, and decrees *pro confesso* for the respondent followed. The Court of Appeals for the District of

[1] Both these corporations are wholly owned by the United States.

Columbia affirmed, 100 F. (2d) 678, and we granted certiorari, 307 U. S. —, because the controversy raised matters of importance in the administration of the National Banking Act.

At the threshhold we are met by two recent decisions of this Court, *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In view of the thorough consideration which these two cases received and the added weight which they derive from the authority, in the field of banking, of Mr. Justice Brandeis, the writer of the opinions, we start with full acceptance of what they decided.

The *Pottorff* case held that a national bank was without authority to pledge its assets as security for private deposits. In the absence of specific authority to make such pledges, the general policy of the Act and principles of sound banking practice were drawn upon to establish the prohibition. To allow the withdrawal of assets of the bank from general availability would impair the bank's liquidity—its ability to meet unexpected demands by depositors—and thereby restrict the national banking system as a reliable instrument of national finance. In the *Sneeden* case the banking standards relied upon in the *Pottorff* case were applied likewise to deny to national banks power to pledge their assets as security for deposits by state and local governmental agencies except where permission is given by the Act of June 25, 1930, 46 Stat. 809 (12 U. S. C. § 90).[2]

But the function of national banks as depositaries of federal funds was not before the Court in the *Pottorff* and *Sneeden* cases, and the power of the banks in relation to such funds could not have been decided there. That power is the exact issue here. The solution of this problem, however, must be found by application of those standards for judgment which were decisive in the former cases. In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the national banks as fiscal agencies must give meaning to the silence of the Act.

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[2] Lewis v. Fidelity Co., 292 U. S. 559, involved merely the application of the Sneeden doctrine to the special circumstances presented by Georgia legislation in the case of national banks situated in that State. The Lewis case, like the Pottorff and Sneeden cases, did not bring into issue the power of national banks with reference to federal deposits. Of course, the Lewis case neither professed to enlarge, nor could it, the scope of the Pottorff and Sneeden decisions.

Congress has necessarily been concerned from the beginning to provide appropriate safeguards for government funds. One of the motives in the establishment of the first Bank of the United States was its availability as a safe depositary for such funds. They were kept there until the expiration of that Bank's charter in 1811. Thereafter and until the second Bank of the United States was chartered, government monies were kept in state banks. These deposits were without security, and as a consequence severe losses followed the financial dislocation which came with the War of 1812. This experience led the Government to exact security, and losses became negligible. Phillips, Methods of Keeping the Public Monies of the United States, pp. 6-20; H. Rep. No. 358, 21 Cong., 1st Sess., Vol. 3, p. 12; IV McMaster, History of the People of the United States, p. 295 *et seq.*; III American State Papers, Finance, p. 11. The second Bank of the United States, established partly to serve as a Government depositary, kept most of the federal funds until their withdrawal in 1833 by Secretary Taney. But as a condition to their deposit in various state banks after 1833, Taney, acting upon the earlier experience of the Treasury under Secretaries Gallatin and Crawford, exacted appropriate security.[3] By the Act of June 23, 1836, 5 Stat. 52, Congress translated Treasury practice into legislative policy. It thereby became the Secretary's duty, whenever wisdom dictated, to require collateral for Government funds. As a result security was demanded of almost all the depositaries. Phillips, *op cit.*, p. 63. The panic of 1837 brought another modification. Government monies were held by the local collectors and by the Treasury itself, and a little later deposited in the new Sub-Treasury. But in 1841 the old method of deposit in state banks was resumed under the practice which had been introduced in 1833. Exec. Doc. No. 123, 27th Cong., 2nd Sess., p. 2; Phillips, *op cit.*, p. 113. This arrangement—that is, deposits secured by collateral—continued until the Sub-Treasury Act of 1846, 9 Stat. 59, led to the withdrawal of Government funds from private banks. The sub-treasury system persisted until the establishment of the modern national banking system.

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[3] These conditions, incorporated in contracts between the Treasury and the banks, required collateral to be pledged for all deposits in excess of one-half the bank's paid-in capital. In addition the Treasury reserved the right to demand additional security whenever it was thought prudent. Exec. Doc. No. 2, 23rd Cong., 1st Sess., Vol. 1, p. 36; Phillips, *op cit.*, pp. 53-55; Girard, The Independent Treasury, p. 17.

The policy of securing Government deposits thus antedates the National Banking Act. It was the practical response to disastrous experience. It began without any statutory authorization, and was continued both with and without specific Congressional sanction. Long practice and Congressional approval lodged in the Secretary of the Treasury authority to take appropriate measures to safeguard the nation against loss of its funds. The integrity of Government monies was naturally considered an object of great national importance, the attainment of which properly belonged to those entrusted with their disposition.

It is against this background that the National Banking Act of 1864 must be projected, intended as it was to provide facilities for the deposit of Government funds. Congress was alive to the Treasury's experience with deposits, secured and unsecured, during the preceding decades, together with the policy which had evolved from that experience. Cong. Globe, 37th Cong., 3rd Sess., Pt. I, pp. 843-45. The banking system which Congress thus established embodied a blend of governmental and private purposes. See *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; Davis, The Origin of the National Banking System, S. Doc. No. 582, 61st Cong., 2nd Sess.

By § 45 of the Act, Congress specifically commanded the Secretary of the Treasury to exact security for "public monies" deposited by him in national banks. R. S. § 5153 (12 U. S. C. § 90). We read this as an exaction of duty from the Secretary as to monies subject to his control, see *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 449, and not as a limitation upon the power of the bank to give security when it may be required by other Government officers and agencies charged with the custody of federal funds. Placing § 45 in the setting of its history, we do not think it should be read in a niggardly spirit, as though it expressed a gingerly departure from public policy. On the contrary, it is a manifestation of historic national practice, which is to be given scope consonant with the reason for its development. Compare *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. By a series of specific statutory commands, Congress has recognized the power of national banks to give security for deposits of a governmental nature by laying upon various agencies, charged with the custody of such funds, a duty to exact collateral. See § 61 of the Bank-

ruptcy Act, 30 Stat. 562; § 9 of the Postal Savings Act, 36 Stat. 816; and Acts relating to Insolvent Bank Funds, 39 Stat. 121; Porto Rican Funds, 39 Stat. 951; Government Obligations, 40 Stat. 291 and Indian Monies, 40 Stat. 591. With one exception all these special statutory requirements pertain to funds held by the Government for the benefit of others. It is difficult to suppose that what Congress has commanded with respect to funds held by its agencies in an immediate fiduciary capacity, it would deem a violation of law if done with respect to funds beneficially owned by the United States itself. What may be inimical to the private aspects of the national banking system, and therefore *ultra vires*, has no such relevance to the public aspect of national banks, and to the enforcement of the public interest by those charged with primary responsibility for its guardianship.

So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*. Compare *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8.[4] The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States*, 263 U. S. 341; *Emer. Fleet Corp.* v. *West. Union*, 275 U. S. 415. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. Compare *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106, 113. See Seventeenth Annual Report, U. S. Shipping Board, 1933, pp. 88-89, for summary of losses borne by Treasury on behalf of the Merchant Fleet Corporation, and compare Annual Report, Inland Waterways Corporation, 1936, pp. 16-22.

The policy underlying Congressional legislation and reflected in the history of governmental deposits is confirmed by the explicit recognition of that official in whom is centered oversight of the ad-

[4] See McDairmid, Government Corporations and Federal Funds, 31 Am. Pol. Science Rev. 1095; Federal Corporations and Corporate Agencies, 16 Harv. Bus. Rev. 436. The corporations, of course, perform "governmental" functions. Graves v. O'Keefe, 306 U. S. 466.

ministration of the National Banking Act. S. Doc. 175, 73rd Cong., 2nd Sess. The Comptroller of the Currency, to be sure, must himself move within the orbit of the National Banking Act. Illegality cannot attain legitimacy through practice. But when legality itself is in dispute—when Congress has spoken at best with ambiguous silence—a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress. More than half a dozen agencies have thought it their duty to safeguard deposits in nearly a hundred banks by transactions similar to those before us. This practice had the approval of the Comptroller because he believed it within the scope of the National Banking Act. Even constitutional power, when the text is doubtful, may be established by usage. See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 473. When dealing with such necessarily argumentative concepts as those of which the law of *ultra vires* is so largely composed, the responsible and pervasive practice of public officers bent on safeguarding the public interests ought to carry the day even were the issue more in doubt than we believe it to be.

Deeming the challenged pledges to have been validly made, we think petitioners were entitled to judgment. It is therefore unnecessary for us to consider the other arguments here urged in their behalf. The judgments below should be

Reversed.

Mr. Justice REED and Mr. Justice MURPHY took no part in the disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1939.

Inland Waterways Corporation, et al., Petitioners, vs. Frederick J. Young, Receiver of Commercial National Bank of Washington, D. C.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 25, 1940.]

Mr. Justice Roberts,

The court below followed and applied the decisions of this court in *Texas & Pacific Railway* v. *Pottorff*, 291 U. S. 245, *Marion* v. *Sneeden*, 291 U. S. 262, and *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559.

It is true that those cases presented the question whether national banks are authorized to give security for private deposits and those of state agencies. But the basis of each of the decisions was that national banks are without power to pledge assets as security for *any* deposits, in the absence of express legislative sanction. Paradoxically, the opinion of the court, while recognizing the authority, in the field of banking, of Mr. Justice Brandeis, who announced the opinions in all three cases for a unanimous court, rejects the fundamental principle of the opinions. Whereas in the *Lewis* case Mr. Justice Brandeis announced in plain terms that, in the absence of express authorization, a national bank has "no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress", the opinion of the court spells out such power despite "the silence of the act."

In the *Texas & Pacific* and *Marion* cases the opinions point out that whenever Congress has intended that security should be taken for deposits of government funds specific authority has been granted.[1] That what was thus said by Mr. Justice Brandeis was deemed necessary to the decisions and was the deliberate conclusion

[1] See Texas & Pacific Ry. Co. v. Pottorff, p. 257, Note 11; Marion v. Sneeden, p. 268.

of the court is evidenced by his statement in *Lewis* v. *Fidelity Co.*, at p. 564:

"In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, . . . we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

Now it is said that these cases incorrectly state the governing principle. That principle is now said to be that Congress cannot have intended to limit the authority of banks to give security in cases where administrative officers in charge of government funds have deemed it appropriate that security should be given. In other words, despite the withholding of any grant of power to institutions whose powers are only those granted,[2] a power is spelled out.

The attempt to buttress the implication of the power from the fact that federal agencies have heretofore exacted security, and that the Comptroller of the Currency has been of the view that such pledges were not in violation of the Act, is answered by what was said in *Marion* v. *Sneeden* (p. 269):

"comptrollers of the currency knew that this was being done; and they assumed that the banks had power so to do. But the assumption was erroneous."

I think that as the Court of Appeals followed the principle rightly applied in the decisions of this court its judgment should be affirmed.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS join in this opinion.

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2 "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied." Texas & Pacific Ry. v. Pottorff, p. 253.